TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 239.

HENRY CLAIRMONT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED MARCH 28, 1922.

(22,079.)

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a *Names and Addresses of Attorneys of Record.*

Hon. Geo. W. Wickersham, Attorney General of the United States, Washington, D. C., and
James W. Freeman, Esq., United States Attorney, District of Montana, Helena, Montana, for Plaintiff and Defendant in Error.
O. W. McConnell, Esq., Helena, Montana, for Defendant and Plaintiff in Error.

1 In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Be it remembered, that on the 3rd day of February, A. D. 1910, a Judgment Roll was duly made and filed herein, which said Judgment Roll is in the words and figures following, to-wit:

2 UNITED STATES OF AMERICA,
District of Montana, ss:

In the District Court of the United States within and for the District of Montana, of the Term of November, in the Year of Our Lord One Thousand Nine Hundred and Eight.

The Grand jurors of the United States of America, duly empanelled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Henry Clairmont, late of the State and District of Montana, on the 15th day of August, A. D. 1908, at and within the State and District of Montana, did, then and there, wrongfully and unlawfully introduce a large quantity of spirituous and intoxicating liquors, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the Grand Jurors aforesaid unknown, into the Flathead Indian Reservation, in the State and District of Montana, the said Flathead Indian Reservation, then and there, being an Indian country under the charge of Samuel Bellew, then and there the United States Indian Agent and Superintendent in charge of said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JAS. W. FREEMAN,
United States Attorney, District of Montana.

3 (Indorsed:) No. 1327. United States District Court, District of Montana. United States of America v. Henry Clairmont. Indictment, a true bill. C. A. Whipple, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney District of Montana. Witnesses: Fred C. Morgan, Sam Cone, Hugh Montgomery, Joe Matulys, Sam Bellew. Presented by the Grand Jury, in open court, by their Foreman, and in their presence, and filed this 22nd day of Dec. A. D. 1908. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy Clerk. Bail $500.00. W. H. Hunt, Judge.

4 UNITED STATES OF AMERICA,
District of Montana, ss:

To the Marshal of the United States of America for the District of Montana, and his Deputies, or any or either of them, Greeting:

Whereas, at a District Court of the United States of America, for the District of Montana, begun and held at the City of Helena, within and for the District aforesaid, on the 22nd day of December, in the year of our Lord one thousand nine hundred and eight, the Grand Jurors in and for the said District brought into the said court a true Bill of Indictment against Henry Clairmont, for unlawfully introducing whiskey into the Flathead Indian Reservation, as by the said indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said Henry Clairmont has not yet appeared or pleaded:

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said Henry Clairmont and him bring before the said court, at the United States District Court room, in the Federal Building at Helena, Montana, to answer the indictment aforesaid.

Witness the Honorable William H. Hunt, Judge of the said court, and the seal thereof at Helena, in said District, on the 22nd day of December, A. D. 1908.

[SEAL.]

GEO. W. SPROULE, *Clerk*,
By C. R. GARLOW,
Deputy Clerk.

5 *Marshal's Office.*

UNITED STATES OF AMERICA,
District of Montana, ss:

In obedience to the Warrant, I have taken into custody the therein named Henry Clairmont at near Ronan, in Missoula County, in said District on the 18th day of January, 1909, and taken him before Wallace P. Smith, Esq., United States Commissioner at Missoula, Montana in and for said District, before whom he was admitted to bail in the sum of Five Hundred Dollars ($500.00), and thereupon he was released from custody. The bail bond is returned herewith and made a part of this return.

ARTHUR W. MERRIFIELD,
United States Marshal,
By J. G. SANDERS, *Deputy.*

Indorsed: No. 1327. United States District Court, District of Montana. The United States of America vs. Henry Clairmont. Bench Warrant. Bail fixed at $500.00. Jas. W. Freeman, U. S. Attorney. Filed Jan. 21st, 1909. Geo. W. Sproule, Clerk.

6 In the District Court of the United States, District of Montana.

No. 1327.

UNITED STATES
vs.
HENRY CLAIRMONT.

Defendant with his counsel, N. W. McConnell, present in court and being arraigned answered that his true name is Henry Clairmont; and thereupon defendant waived the reading of the Indictment and time to plead, and thereupon defendant pleaded that he is not guilty, with leave to defendant to hereafter withdraw his plea if desired; and plea of not guilty entered.

Entered, in open court, January 21, 1909.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of journal entry.

GEO. W. SPROULE, *Clerk,*
[SEAL.] By C. R. GARLOW,
Deputy Clerk.

7 In the District Court of the United States in and for the District of Montana.

No. 1327.

UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CLAIRMONT, Defendant.

Verdict.

We, the jury in the above entitled action, find the above named defendant guilty in manner and form as charged in the indictment, and we respectfully recommend the defendant to the mercy of the court.

C. W. FLEMING, *Foreman.*

Indorsed: No. 1327. In the District Court of the United States, in and for the District of Montana. United States of America. Plaintiff, vs. Henry Clairmont, Defendant. Verdict. Filed and entered Mar. 26, 1909. Geo. W. Sproule, Clerk.

8 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant, Henry Clairmont, in his own proper person, the court being about to pronounce sentence and judgment upon the verdict of the jury, returned into court in this cause, and moves the court to arrest the judgment upon the indictment upon which this defendant was found guilty by the jury, and assigns as reasons why the judgment should be arrested the following, to-wit:

1. That the evidence was insufficient to warrant the jury in finding the defendant guilty.

2. That the court erred in failing and refusing to instruct the jury to acquit the defendant.

3. That it appears from the evidence that the defendant was on a train of the Northern Pacific Railway Company at the time he was arrested, and at the time it is alleged that the liquor was found upon his person, and it was not shown that he had introduced, or attempted to introduce the same upon an Indian reservation at the time said liquor was taken from him.

4. At the time of the alleged offense charged in the indictment the defendant was traveling from the City of Missoula on a train
9 of the Northern Pacific Railway Company; had not gotten off of said train, or attempted to get off of said train, but was still upon the same; had not been upon the Flathead Indian Reservation or introduced, or attempted to introduce, any liquor thereon, but was occupying his seat in the railway coach of said Northern Pacific train.

5. That at the time of the arrest of the defendant the said defendant was on a train of the Northern Pacific Railway Company, which said train was on the right-of-way of said railway company, which said right-of-way had been ceded by a treaty of the Flathead Indians to the United States of America, and by the United States of America, by act of Congress, had been dedicated and given to said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest and at the time of the alleged commission of the offense with which he is charged, for any offense committed on said train.

6. That the United States of America had no power or authority over any offense committed on said train of the Northern Pacific Railway Company by the defendant, but the sole and exclusive jurisdiction of any offense committed upon said train was in the State of Montana.

HENRY CLAIRMONT.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing acknowledged and copy received this March 27th, 1909.

S. C. FORD,
Ass't U. S. Att'y.

Indorsed: No. 1327. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Motion in Arrest of Judgment. Filed March 27, 1909. Geo. W. Sproule, Clerk.

10 In the District Court of the United States, District of Montana.

No. 1327.

UNITED STATES OF AMERICA
vs.
HENRY CLAIRMONT.

This cause, heretofore submitted upon a motion in arrest of judgment, came on regularly at this time for the judgment and decision of the court; and, after due consideration,

It is ordered that said motion be, and the same hereby is denied, to which ruling of the court the defendant excepted, and exception noted.

Entered, in open court, January 20, 1910.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of journal entry:
GEO. W. SPROULE, *Clerk,*
[SEAL.] By C. R. GARLOW,
Deputy Clerk.

11 In the District Court of the United States, District of Montana.

No. 1327.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the court of the nature of the charge against him, for the offense of wrongfully and unlawfully introducing spirituous and intoxicating liquors, to-wit, whiskey, into the Flathead Indian Reservation, an Indian country, committed on

the 15th day of August, A. D. 1908, at Flathead Indian Reservation, in the State and District of Montana, as charged in the indictment herein; and of his indictment, arraignment and plea of not guilty as charged; and of his trial and the verdict of the jury "Guilty" as charged.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment as follows, to-wit:

That whereas, the said defendant having been duly convicted in this court of the offense of wrongfully and unlawfully introducing spirituous and intoxicating liquors, to-wit, whiskey, into the Flathead Indian Reservation, an Indian country, committed on the 15th day of August, 1908, at Flathead Indian Reservation, in the State and District of Montana, as charged in the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said Henry Clairmont, be confined and imprisoned in the county jail of Lewis and Clark County, at Helena, Montana, for the term of sixty days, and that you pay a fine of One Hundred Dollars, and be confined in said county jail until said fine is paid or you are legally discharged according to law.

Judgment rendered and entered this 3rd day of February, A. D. 1910.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of Judgment:

[SEAL.] GEO. W. SPROULE, *Clerk.*

12 UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 3rd day of February, A. D. 1910.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Indorsed:) No. 1327. In the District Court of the United States, District of Montana. The United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Judgment Roll. Filed and entered Feb. 3rd, 1910. Geo. W. Sproule, Clerk.

13 And thereafter, to-wit, on the 17th day of February, 1910, defendant filed his Motion for New Trial herein, said Motion being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Motion for New Trial.

Now comes the defendant, Henry Clairmont, and moves the court to set aside the verdict of the jury and to grant him a new trial herein, for the following reasons:

1. That the United States Grand Jury had no jurisdiction to find or present an indictment in this case.
2. That the court had no jurisdiction to try this action.
3. That the testimony showed that no offense was committed on the Flathead Indian Reservation, nor upon any territory over which the United States had jurisdiction.
4. That there is no jurisdiction of the District Court of the United States, for the District of Montana, to try the alleged offense, for the reason that at the time of the arrest of the defendant he was travelling on a passenger train of the Northern Pacific Railway Company, which said train was on the right of way of said Railway Company; that the defendant had not gotten off of said train, nor attempted to get off of said train, but was still upon the same at the time of his arrest; that he was not upon the Flathead Indian Reservation; that he took no liquor upon the Flathead Indian Reservation, nor did he attempt to introduce any liquor thereon, but
14 at the time of his arrest he was occupying his seat in the railway coach of the passenger train of the Northern Pacific Railway Company, and any liquor found upon him was taken from the defendant before he left the passenger train.
5. That the evidence was insufficient to warrant the jury in finding the defendant guilty.
6. That the court erred in failing and refusing to instruct the jury to acquit the defendant.
7. The court erred in refusing to give the defendant's requests for instructions.
8. The court erred in his instructions to the jury excepted to by the defendant at the time.
9. The court erred in overruling the defendant's motion in arrest of judgment.
10. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.
11. The court erred in passing sentence upon the defendant.
12. Errors in law occurring at the time and excepted to by the defendant.

Said motion is based upon the papers, pleadings and files herein and a bill of exceptions herewith presented, served and filed.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing motion for a new trial and receipt of copy accepted this 17th day of February, 1910.

S. C. FORD,
Ass't United States District Attorney.

Indorsed: Title of Court and Cause. Motion for New Trial. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

15 And thereafter, on the 17th day of February, 1910, an order denying motion for new trial was duly made and entered herein, in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

No. 1327.

UNITED STATES OF AMERICA
vs.
HENRY CLAIRMONT.

This cause came on regularly at this time upon the motion of defendant for a new trial and, after due consideration, it is ordered that said motion be, and the same hereby is denied; and exception noted.

Entered, in open court, February 17th, 1910.

GEO. W. SPROULE, *Clerk.*

16 And thereafter, to-wit, on the 17th day of February, 1910, defendant's bill of exceptions was duly signed, settled, allowed and filed herein, being in the words and figures following, to-wit:

17 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Bill of Exceptions.

Be it remembered that heretofore, to-wit: on the 22nd day of December, 1908, there was presented and filed in this court an indictment against the defendant, which said indictment is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
District of Montana, ss:

In the District Court of the United States within and for the District of Montana, of the Term of November, in the Year of Our Lord One Thousand Nine Hundred and Eight.

The Grand Jurors of the United States of America, duly empanelled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Henry Clairmont, late of the State and District of Montana, on the 15th day of August, A. D. 1908, at and within the State and District of Montana, did, then and there, wrongfully and unlawfully introduce a large quantity of spirituous and intoxicating liquors, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the Grand Jurors aforesaid un-
18 known, into the Flathead Indian Reservation, in the State and District of Montana, the said Flathead Indian Reservation, then and there, being an Indian country under the charge of Samuel Bellew, then and there the United States Indian Agent and Superintendent in charge of said Flathead Indian Reservation, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JAS. W. FREEMAN,
United States Attorney, District of Montana.

Endorsed: No. 1327. United States District Court, District of Montana. United States of America v. Henry Clairmont. Indictment: A True Bill. C. A. Whipple, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney, District of Montana. Witnesses: Fred. C. Morgan, Sam Cone, Hugh Montgomery, Joe Matulys, Sam Bellew. Presented by the Grand Jury, in open Court, by their Foreman, and in their presence, and filed this 22 day of Dec., A. D. 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. Bail $500. W. H. Hunt, Judge.

19 That thereafter, on the 21st day of January, 1909, the defendant appeared in person and with his counsel and was arraigned, and answered that his true name is Henry Clairmont, and entered a plea of not guilty.

And thereafter, on the 26th day of March, 1909, this cause came on regularly for trial in the above entitled court, before the Hon. William H. Hunt, Judge presiding, when the following proceedings were had, to-wit: A jury was empanelled and sworn to try said cause, and thereupon the United States of America, to maintain the issues on its part, introduced and offered the testimony of the following witnesses:

SAM CONE testified as follows:

My name is Sam Cone; I have headquarters in Salt Lake City, and am special officer of the Interior Department for the suppression of the liquor traffic among the Indians, and was such special officer on the 15th day of August, 1908. I know the defendant, Henry Clairmont, and saw him on the 15th day of August, 1908, a little after twelve o'clock in the night. He was drunk on the train, and I searched him and found a pint of whiskey on his person (witness produced a bottle of whiskey). He had it in the inside pocket of his coat. I got on one train at Missoula and went from there to Arlee and took several prisoners off the train at Arlee, and when the next train came along I got on that train and raided it. This is the defendant here that I arrested upon that occasion. This took place on the Flathead Reservation.

Cross-examination:

I had gone from Missoula to Arlee on Train No. 3. The defendant was on Train No. 5; he was not on the same train I was on; I was on the train ahead of him; I got on his train to make a raid. I did not know he was on that train; I knew some other fellows were on that train; I got on that train to arrest anybody that had whiskey; I got on that train to arrest some other people that I thought were on the train, and I arrested him. I arrested two. The defendant was drunk; the defendant was on the train when I arrested him; he was making no attempt to get off the train at Arlee; he told me he was going to Ravalli. I went on the train and found Clairmont on the train, and found out where he was going; then I searched him and found this liquor and took him off the train; that was all there was to it; that is the identical bottle that I took off him; I labeled it and delivered possession of this bottle of whiskey to the United States Marshal; I had it in my grip in my room, with a dozen other bottles; I saw this bottle of whiskey again along about the 20th of December; that is the only time I have seen the bottle since I delivered it to Mr. Haigler, I appeared before the grand jury. I made a good many arrests, and took a good many bottles from different individuals during the month of August. I made probably one hundred and fifty arrests; maybe more than that. I didn't let the defendant go on to Ravalli. When I took this whiskey from him I took it from him there on the train; I put it in my own pocket; when I got off the train at Arlee and took the defendant off the train the defendant didn't have any whiskey on him at all; I arrested him there and took him back to Missoula that night and put him in jail.

Redirect examination:

This bottle is in the same condition now that it was when I sealed it.

By Mr. FREEMAN: We offer this bottle of whiskey in evidence at this time.

By Mr. MCCONNELL: We object to the introduction of this bottle, if the court please, as incompetent and immaterial.

The COURT: Let it be admitted.

By Mr. MCCONNELL: Note an exception to the ruling of the Court.

21 JOE J. MATULYS, called as a witness on behalf of the Government, testified as follows:

My name is Joe J. Matulys; I have headquarters at Salt Lake City, Utah; am United States special officer for the suppression of the liquor traffic among the Indians; I am acquainted with the defendant, Henry Clairmont; saw him on or about the 15th day of August, 1908. I went with Mr. Cone on the first train, and after we had made the different arrests we went out and saw the second train coming in and Mr. Cone and I boarded that train, and we saw Henry Clairmont. He said he was going to Ravalli. Mr. Cone searched him and found this bottle of whiskey. After Cone had taken the bottle of whiskey from Clairmont he stuck it in his pocket; then we took him off the train and went in to the depot at Arlee. Mr. Cone took care of the bottle of whiskey during the preliminary hearing, where we had it up for evidence.

Cross-examination:

A man by the name of Ashley and a man by the name of Raymond were arrested at the time we arrested Clairmont; bottles of whiskey were taken off of them; there must have been about fifteen bottles, varying in size; I could not tell how much whiskey was in them; I would not undertake to identify this bottle as the one taken from Clairmont without the label; that label was put on at Arlee. Mr. Cone had several bottles that he took from these people when he came from the train, and I had several that night, when we were arresting so many men, and the train only stopped there a minute, and we took fifteen bottles; I don't mean to say that I marked them all, not at the time.

We had made a raid on the first train that came through there. We started out with about twenty that we had got off the first train, but when we landed in the depot we had about ten. Ten of them got away. We destroyed a good many of the bottles
22 that we took off these fellows; when a man had more than one bottle we only saved one for evidence. We didn't destroy the bottle that we took off Clairmont, because it was the only one he had. We made twenty arrests on the first train and three arrests on the next train; we arrested twenty-three that night, but we had only about fifteen bottles of whiskey. I don't remember now whether there were eight that we didn't find bottles on at all. During the month of August, 1908, I arrested, or assisted in arresting, probably one hundred or so. Since August I have arrested or assisted in arresting, about twenty-five.

Redirect examination:

I tasted the contents of this bottle; it contained whiskey.

H. H. MONTGOMERY, a witness on behalf of the Government, testified as follows:

My name is H. H. Montgomery; I live in Missoula, and I am clerk for the Northern Pacific Railway Company. I remember when some of the arrests were made on the 15th of August last; I remember when Mr. Cone and Mr. Matulys brought Henry Clairmont into the depot, where I was, with a number of other prisoners; he was taken back to Missoula on the train that got into Missoula about three o'clock; I saw Mr. Cone mark a bottle there at the ticket window.

Cross-examination:

I saw Mr. Cone mark the bottle there that night, just one for Clairmont. There were suit cases there with liquor in them; he had several suit cases and telescopes; some of the bottles were in suit cases; some of them he broke and some he marked; this is the only one he marked with a label. I saw probably forty bottles there that night; they were in suit cases; there was a dozen bottles in a suit case, with the number of the bottle, I saw there that night, I am not able, outside the label that is on the bottle, to identify it
23 as the bottle that was taken from Henry Clairmont. Clairmont was so intoxicated he lay down on the floor and went to sleep. I just went along with Cone and Matulys to see the fun; they told me they were going to gather them in; they did get about twenty-five in the raid. I guarded eight men; a part of the arrests were made about 10:30, and some of them were made around 12 o'clock at night.

SAMUEL BELLEW, a witness on behalf of the Government, testified as follows:

My name is Samuel Bellew. On the 15th day of August, 1908, I was Indian Agent for the Flathead Reservation. I know the defendant Henry Clairmont; he lives upon the Indian Reservation, about four or five miles from Ronan; the railroad station where he would get off would be Ravalli; that station is on the Reservation, and also on the right of way; the town of Arlee, or station of Arlee, is also on the Reservation.

The Government then rested its case, and thereupon the attorney for the defendant moved the court to instruct the jury to return a verdict acquitting the defendant, for the reason that it appears from the testimony of the Government that the liquor was taken from the defendant while he was on a train of the Northern Pacific Railway Company, and not on the Reservation, and it was not shown that he intended to introduce liquor upon the Reservation.

Which motion the court then and there overruled and required the defendant to introduce proof, to which ruling of the court the defendant then and there duly excepted.

Defendant's Case.

HENRY CLAIRMONT, a witness in his own behalf, testified as follows:

My name is Henry Clairmont and I live on the Flathead Reservation with my family, consisting of my wife and two chil-
24 dren. I own and cultivate one hundred and eighty acres of land; I have lived there about twenty years; I am now twenty-three years old. I was on the train when I was arrested by Mr. Cone. I was coming from Missoula. I had been in Missoula about five or six days. I brought my wife in there and took her to a doctor for an operation. I had been up quite a bit since I had been there, and lost quite a lot of sleep, and was feeling pretty tired the night I was going to leave to go back. I had left my little child at home, and I was going back after her after the operation was performed, and I was feeling pretty tired, and I thought I would take a little bracer with me to go on the train. I had quite a long trip ahead of me, and thought I would take this little bracer with me as long as I was on the train, not intending to take it off the train with me; I intended to drink that on the train.

I bought a half pint of whiskey in Missoula, it was in a plain bottle or flask; I paid two bits for it. After I got on the train I had the bottle in my pocket and I took about three or four drinks out of it, good sized drinks; I gave a drink to another fellow; he took a pretty good drink; it seems that he was pretty dry. When I was arrested by Mr. Cone there was left in the half pint flask not more than two drinks. It was ten miles from Arlee to Ravalli. My intention was to drink the balance of this whiskey before I got to Ravalli, before I got off the train. So far as I can see about this bottle, it is not the bottle I bought, because this bottle is full, and the bottle they took from me wasn't more than about three fingers or two fingers and a half left in the flask; when they took it away from me it was not as nearly full as this bottle. This is not the bottle that was used in the preliminary hearing against me before the Commissioner in Missoula. The bottle they had there in Missoula
25 and used against me was about half full, or nearly half full, as near as I can judge.

Cross-examination:

I do not think the bottle they had at Missoula was the bottle they took from me. I don't think I ever saw the bottle they took off me afterwards. I was not drunk that night. I didn't lie down on the floor, but I sat down there on the floor because I was pretty tired; my feet were sore, because I had been on my feet so much and I was tired and I sat down. I bought a half pint of whiskey; I had paid two-bits for it; I did not buy a couple of bottles; I took the last drink on the train between Missoula and Arlee; I needed a bracer to keep me up, because I had about thirty-five miles ahead of me, a trip of thirty-five miles to drive in a rig from the station to my home. I expected to brace up with this half pint of whiskey, and I thought I

would be in good condition by the time I got ready to make this drive of about thirty-five miles.

Defendant rests.

Rebuttal.

SAM CONE, recalled as a witness for the Government, testified as follows in rebuttal:

I didn't take any half pint bottle from Mr. Clairmont at all; that is the bottle right there that I took from him. When I got into the depot, when we took the other men from the train, all the bottles we took from them were labeled, and when I arrested Mr. Clairmont I didn't have any other bottle on my person at all except the bottle I took from him. If he had a half pint bottle I didn't see it; the only bottle on him was full, or almost full; this is the same bottle that was used before the Commissioner.

26 Cross-examination:

We took eight bottles from Ashley that night and one from Raymond. I am probably wrong about the kind of bottles taken from them.

JOE J. MATULYS, recalled on behalf of the Government, testifies as follows:

I didn't see any half pint bottle with about two fingers of whiskey in it, taken from the defendant; that is the only bottle that I saw Mr. Cone take from Clairmont that night. This is the only bottle I saw introduced in the Clairmont case at Missoula.

H. H. MONTGOMERY, recalled on behalf of the Government, testified as follows:

I was at the preliminary examination of the defendant at Missoula. There was not any bottle introduced in his case that was simply half full of whiskey; the one introduced before the Commissioner down at Missoula is similar to this.

Whereupon the Government rested its case.

This was all the testimony introduced in the case.

And thereupon the defendant respectfully requested the court to give the jury the following instructions:

Requests for Instructions.

I. The jury are instructed in this case that the law does not require that the defendant prove himself innocent of the crime charged against him, but the law imposes upon the Government to prove that the defendant is guilty in manner and form as charged in the indictment to the satisfaction of the jury beyond a reasonable doubt, and unless the Government has done so, the jury should find the defendant not guilty.

II. The jury are instructed that the indictment in this case is

of itself a mere accusation or charge against the defendant,
27 and is not of itself any evidence of the defendant's guilt, and no juror in this case should permit himself to be to any extent influenced against the defendant because or on account of the indictment in this case.

III. You are instructed that the defendant is presumed to be innocent of the crime charged, and this presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give the defendant in this case the full benefit of any presumption and to acquit the defendant, unless they feel compelled to find him guilty as charged by the law of the land and the evidence in the case, convincing them of his guilt as charged beyond a reasonable doubt.

IV. You are instructed that mere probabilities are not sufficient to warrant conviction; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment; nor is it sufficient that upon the doctrine of chance it is more probable that the defendant is guilty. To warrant a conviction of the defendant, he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent, when all the evidence in the case is considered together.

V. You are instructed that under the law no jury should convict a person of crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there is a strong reason to suspect that he is guilty; but before the jury can lawfully convict they must be convinced of the defendant's guilt beyond a reasonable doubt.

VI. You are instructed that in this case the burden of proof rests upon the Government to make out and prove to the satisfac-
28 tion of the jury, beyond a reasonable doubt, every material allegation in the indictment, and unless that has been done, the jury should find the defendant not guilty.

VII. You are instructed that before you can convict the defendant, you must be satisfied beyond a reasonable doubt:

That liquor was actually introduced by him upon the Indian Reservation.

That he intended to take the liquor upon the reservation.

That he owned the liquor, or had charge of it, or was in possession of it for the purpose of introducing it upon the Indian Reservation.

VIII. If you believe from the evidence that the liquor was taken away from the defendant while on a Northern Pacific train, and that as a matter of fact the liquor was not taken by the defendant upon the reservation, then you should find the defendant not guilty.

Filed and entered March 26, 1908.

GEO. W. SPROULE, *Clerk.*

All of which the court refused, to which the defendant duly excepted.

And thereupon the case was argued to the jury by respective counsel, and the court instructed the jury as follows:

Instructions Delivered Orally by William H. Hunt, Judge.

GENTLEMEN: I will read to you the statute, so far as it is applicable, under which this indictment is drawn: "Any person who shall introduce or attempt to introduce any malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or intoxicating liquor of any kind whatsoever, into the Indian country shall be punished by imprisonment for not less than sixty days, and by a
29 fine of not less than one hundred dollars, for the first offense, and not less than two hundred dollars for each offense thereafter."

The indictment charges the defendant with having, on August 15, 1908, introduced a large quantity of spirituous and intoxicating liquor, commonly called whiskey, the exact quantity of which was to the Grand Jurors unknown, into the Flathead Indian Reservation. The quantity is immaterial, provided you find from the evidence that there was, as the law defines, an introducing of the quantity stated or any less quantity of whiskey.

My view of this statute has been expressed a number of times. It is a very severe statute. I don't think the intent of the man introducing the liquor has anything to do with it. There are certain laws passed by governments which make acts themselves unlawful, irrespective of intent. One of the easiest illustrations is in city ordinances. If I tie my horse on main street, or leave him with a weight, I am probably violating a city ordinance; (I take it that there is such an ordinance in Helena; there is in most cities); and if I am arrested, it is no defense to say that I did not intend to violate the law. And so here, the only question in this case is whether or not there was an introduction of the liquor as charged. A man might be so drunk he didn't know what he was doing, and yet, if he introduces liquor into an Indian country, he is guilty. If convicted, he might have ample ground to appeal to the mercy of the court for a light sentence, but that is a matter that is neither here nor there. The question is, did he introduce the liquor charged, or any part of it, into the Indian country.

I have also had occasion to pass upon what is Indian country. I have expressed the opinion that a man is guilty of a violation of this statute who takes liquor upon the Great Northern right of way within the Blackfoot Indian Reservation, if he intends there to use
30 it, or to barter it, or to sell it. The Northern Pacific dining cars carry liquors in crossing a reservation, but that is not introducing the liquors into a reservation, because the Northern Pacific is engaged in interstate commerce and is simply crossing a reservation without intent to engage in the consumption, or barter, or sale of liquor in the Indian country. So a merchant selling liquor at Missoula, to one not in the reserve, might ship his liquor by way of Ravalli to the foot of the Flathead Lake by the carrier or stage which transports freight from Ravalli across the reservation to Polson at

the foot of the Flathead Lake. That is not introducing liquor into the reservation in the sense that the law means. But if any one of us should go upon the reservation, even for recreation, and take with us whiskey, or vinous liquor, or malt, or beer, or other intoxicants, for the purpose of using it, or bartering it, or selling it, or consuming it, on the reservation, we would be guilty, whether we intended to violate the law or not. So, in this, if this defendant, carrying this whiskey, started from Missoula for Ravalli, and if Ravalli was within the limits of the reservation, and his purpose was to use the whiskey, and take it upon the reservation, there to keep it for himself, or to use it on the reservation, there is guilt. I do not see how any other view of the law could well be taken. I cannot believe that the United States Government ever intended to permit traffic all along the right of way of the Northern Pacific, within the reservation, in whiskey, or other liquor. If that be the law, we might have saloons all along the right of way; the Indians could stop off what might be called the main reservation, right beside the track, get drunk, and the man who sold them liquor could not be indicted by the United States, and the Indians could not be indicted. I do not believe that that is a correct interpretation of the law. I think that, in these police regulations, the question of intent has nothing to do
31 with the matter. It is simply a question whether or not the whiskey was taken into the reservation, as explained to you.

The defendant is presumed to be innocent, and the burden rests upon the Government to prove by competent evidence, to your satisfaction, beyond a reasonable doubt, that the defendant introduced the liquor, as charged in the indictment. You must have an abiding conviction to a moral certainty that the charge is true and has been proven to be true by the evidence that you have heard, in order to convict the defendant. If you are satisfied beyond a reasonable doubt of the truth of the charge, your sworn duty is to convict. If you are not so satisfied, your sworn duty is to acquit. If you convict, you have nothing to do with the punishment. All twelve of you must concur in any verdict rendered.

(Addressing counsel:) You may dictate your exceptions to the stenographer.

By Mr. McConnell: The defendant desires to except to the instructions of the court on the question of intent, and also to the instruction of the court as to what is the Indian country, and particularly to the instruction of the court to the effect that a party upon a Northern Pacific train, having whiskey in his possession, even though he may be going to some point on the reservation, though he has not yet left the train, is introducing liquor upon the reservation. We also except to the refusal of the court to give each and all of the instructions requested by the defendant to be given.

And thereafter the jury returned into court the following

Verdict.

We, the jury in the above entitled action, find the above named defendant guilty in manner and form as charged in the indict-

ment, and we respectfully recommend the defendant to the
32 mercy of the court.

C. W. FLEMMING, *Foreman.*

And thereafter, on the 27th day of March, 1909, and before the sentence of the court, the defendant made a motion in arrest of judgment, which said motion is as follows:

(Title of Court.)

(Title of Cause.)

Motion in Arrest of Judgment.

Now comes the defendant, Henry Clairmont, in his own proper person, the court being about to pronounce sentence and judgment upon the verdict of the jury, returned into court in this cause, and moves the court to arrest the judgment upon the indictment upon which this defendant was found guilty by the jury, and assigns as reasons why the judgment should be arrested the following, to-wit:

1. That the evidence was insufficient to warrant the jury in finding the defendant guilty.

2. The court erred in failing and refusing to instruct the jury to acquit the defendant.

3. That it appears from the evidence that the defendant was on a train of the Northern Pacific Railway Company at the time he was arrested, and at the time it is alleged the liquor was found upon his person, and it was not shown that he had introduced, or attempted to introduce the same upon an Indian reservation at the time said liquor was taken from him.

4. At the time of the alleged offense charged in the indictment the defendant was traveling from the City of Missoula on a train of the Northern Pacific Railway Company; had not gotten off said train, or attempted to get off of said train, but was still upon the same; had not been upon the Flathead Indian Reservation, or intro-
33 duced, or attempted to introduce, any liquor thereon, but was occupying his seat in the railway coach of said Northern Pacific train.

5. That at the time of the arrest of the defendant the said defendant was on a train of the Northern Pacific Railway Company, which said train was on the right of way of said railway company, which said right of way had been ceded by a treaty of the Flathead Indians to the United States of America, and by the United States of America, by Act of Congress, had been dedicated and given to said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest and at the time of the alleged commission of the offense with which he is charged, for any offense committed on said train.

6. That the United States of America had no power or authority over any offense committed on said train of the Northern Pacific Railway Company by the defendant, but the sole and exclusive

jurisdiction of any offense committed upon said train was in the State of Montana.

HENRY CLAIRMONT.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing acknowledged & copy received this 27th March, 1909.

S. C. FORD,
Ass't U. S. Att'y.

Filed March 27th, 1909.

GEO. W. SPROULE, *Clerk.*

34 Thereupon the cause was submitted upon the motion in arrest of judgment and the court took the same under advisement, and thereafter, on the 20th day of January, 1910, the court ordered that said motion be, and the same was denied, to which ruling of the court the defendant then and there duly excepted, and exception was noted.

Thereafter, on the 3rd day of February, 1910, the court entered a judgment and order adjudging that the defendant, Henry Clairmont, be confined and imprisoned in the county jail of Lewis and Clark County, Montana, for the term of sixty days, and that he pay a fine of one hundred dollars, to which judgment and sentence of the court the defendant then and there duly excepted.

Thereafter the defendant interposed a motion for a new trial, which said motion for a new trial is as follows: to-wit:

(Title of Court.)

(Title of Cause.)

Motion for a New Trial.

Now comes the defendant, Henry Clairmont, and moves the court to set aside the verdict of the jury and to grant him a new trial herein, for the following reasons:

1. That the United States Grand Jury had no jurisdiction to find or present an indictment in this case.

2. That the court had no jurisdiction to try this action.

3. That the testimony showed that no offense was committed on the Flathead Indian Reservation, nor upon any territory over which the United States had jurisdiction.

4. That there is no jurisdiction of the District Court of the United States, for the District of Montana, to try the alleged offense, for the reason that at the time of the arrest of the defendant he was traveling on a passenger train of the Northern Pacific Railway Company, which said train was on the right of way of said Rail-

35 way Company; that the defendant had not gotten off of said train, or attempted to get off of said train, but was still upon

the same at the time of his arrest; that he was not upon the Flathead Indian Reservation; that he took no liquor upon the Flathead Indian Reservation, nor did he attempt to introduce any liquor thereon, but at the time of his arrest he was occupying his seat in the railway coach of the passenger train of the Northern Pacific Railway Company, and any liquor found upon him was taken from the defendant before he left the passenger train.

5. That the evidence was insufficient to warrant the jury in finding the defendant guilty.

6. That the court erred in failing and refusing to instruct the jury to acquit the defendant.

7. The court erred in refusing to give the defendant's requests for instructions.

8. The court erred in his instructions to the jury excepted to by the defendant at the time.

9. The court erred in overruling the defendant's motion in arrest of judgment.

10. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

11. The court erred in passing sentence upon the defendant.

12. Errors in law occurring at the time and excepted to by the defendant.

Said motion is based upon the papers, pleadings and files herein and a bill of exceptions herewith presented, served and filed.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing motion for a new trial and receipt of copy accepted this 17th day of February, 1910.

S. C. FORD,
Ass't United States District Attorney.

36 The court overruled the defendant's motion for a new trial, to which ruling of the court the defendant then and there duly excepted.

And thereafter the court granted the defendant to and including the 19th day of February, 1910, in which to prepare, serve and file a bill of exceptions in this cause.

And now, in furtherance of justice, and that right may be done, the defendant, Henry Clairmont, tenders and presents the foregoing as his bill of exceptions in this cause to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this the 17th day of February, 1910.

WILLIAM H. HUNT,
District Judge.

Service of the foregoing Bill of Exceptions acknowledged and copy received this 17th day of February, 1910.

S. C. FORD,
Ass't U. S. Att'y.

Indorsed: Title of Court and Cause. Bill of Exceptions. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

37 And thereafter, to-wit, on February 17th, 1910, a Certificate as to jurisdiction was duly issued herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Certificate as to Jurisdiction.

In this cause I hereby certify that the issue involved in this cause is a question of jurisdiction, and the verdict, judgment and sentence of the court in this cause against the defendant is based upon the ruling of the court, that the United States of America has jurisdiction, and the motion in arrest of judgment and the sentence imposed were decided solely on the ground that the United States of America had jurisdiction in said cause, and the issue presented by the defendant was that the United States of America had no jurisdiction.

This certificate is made in conformity to the laws of Congress of March 3, 1891, Chapter 517. There was no written opinion filed herein.

Dated this 17th day of February, 1910.

WILLIAM H. HUNT,
District Judge, Holding the District Court of the United States for the District of Montana.

Indorsed: Title of Court and Cause. Certificate as to Jurisdiction. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

38 And thereafter, to-wit, on the 17th day of February, 1910, defendant filed his Assignment of Errors herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Assignment of Errors.

The defendant in this action in connection with his petition for a writ of error, specifies and makes the following assignment of errors which he avers exist:

1. The court erred in refusing to instruct the jury to return a verdict acquitting the defendant at the close of all of the testimony for the government, for the reason that it appeared from the testimony of the government that the liquor alleged to have been introduced upon the Flathead Indian Reservation was taken from the defendant while he was on a Northern Pacific Railway Company train; and that he was not on the Flathead Indian Reservation, and it was not shown that the defendant intended to introduce any liquor upon the Flathead Indian Reservation.

2. The court erred in overruling the defendant's motion in arrest of judgment.

39 3. The court erred in failing and refusing to discharge the defendant, for the reason that the United States of America had no jurisdiction of this action and no offense was committed by the defendant on territory within the jurisdiction of the United States, for the following reasons:

(*a*) That at the time of the alleged offense charged in the indictment the defendant was travelling from the City of Missoula, Montana, on a passenger train of the Northern Pacific Railway Company; that he had not gotten off of said train, or attempted to get off of said train, but was still upon the same at the time of his arrest; that he had not been upon the Flathead Indian Reservation with any liquor or introduced, or attempted to introduce any liquor thereon, but was occupying his seat in the railway coach of the train of the Northern Pacific Railway Company as a passenger thereon.

(*b*) That at the time of his arrest the defendant was on a train of the Northern Pacific Railway Company, which said train was on the right of way of said railway company, which said right of way had been ceded by a treaty of the Flathead Indians to the United States of America and by the United States of America, by Act of Congress, had been dedicated and given to the said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest and at the time of the alleged commission of the offense with which he is charged for any offense committed on said train.

(*c*) That the United States of America had no jurisdiction and no power or authority to punish for any offense committed on the train of the Northern Pacific Railway Company by the defendant, but that the jurisdiction of any offense so committed upon said train was in the State of Montana.

40 4. The court erred in its instruction to the jury as to what constitutes the Flathead Indian Reservation, and in instructing the jury that a person upon a Northern Pacific Railway train crossing the Flathead Indian Reservation, and on the right of way of said Railway Company was subject to the jurisdiction of the United States.

5. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

6. The court erred in passing sentence upon the defendant.

7. The United States Grand Jury had no jurisdiction to present an indictment in this case.

Wherefore, the defendant, Henry Clairmont, prays that the judgment be reversed.

O. W. McCONNELL,
Attorney for Defendant.

Indorsed: Title of Court and Cause. Assignment of Errors. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

41 And thereafter, to-wit, on February 17th, 1910, a Petition for Writ of Error was filed herein, being in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Petition for Writ of Error.

Now comes the defendant, Henry Clairmont, and petitions this court for a writ of error herein and says:

That on or about the 3rd day of February, 1910, the above entitled court entered a judgment herein against the defendant, wherein the defendant was sentenced to sixty days in jail and to pay a fine of one hundred dollars for the alleged offense of introducing liquor upon the Flathead Indian Reservation; that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

O. W. McCONNELL,
Attorney for Defendant.

Indorsed: Title of court and cause. Petition for Writ of Error. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

42 And thereafter, to-wit, on the 17th day of February, 1910, an order allowing writ of error was duly made and entered herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Order Allowing Writ of Error.

On this, the 17th day of February, 1910, comes the defendant, by his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow the writ of error, upon the defendant giving bond according to law in the sum of Five Hundred Dollars, which shall operate as a supersedeas bond.

WILLIAM H. HUNT,
District Judge.

Indorsed: Title of court and cause. Order Allowing Writ of Error. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk.

43 And thereafter, to-wit, on the 17th day of February, 1910, a bond on writ of error was duly filed herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Bond.

Know all men by these presents: That we, Henry Clairmont, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the full and just sum of Three Hundred Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of February, 1910.

Whereas, lately, at a District Court of the United States for the District of Montana, in a suit depending in said court between the

United States of America, as Plaintiff, and Henry Clairmont, as defendant, a judgment was entered against the defendant, sentencing him to sixty days in jail and to pay a fine of One Hundred Dollars; and,

Whereas, the defendant, Henry Clairmont, is desirous of prosecuting an appeal from the judgment and sentence of said United
44 States District Court to the Supreme Court of the United States, and has obtained a writ of error and filed a copy thereof in the Clerk's office of said District Court of the United States to reverse the judgment in the aforesaid suit, and a citation, directed to the United States of America and Geo. W. Wickersham, Attorney General of the United States, citing and admonishing said parties to be and appear at a session of the Supreme Court of the United States, to be held at the City of Washington, District of Columbia, within sixty days from the 17th day of February, 1910.

Now, the condition of the above obligation is such that if the said defendant, Henry Clairmont, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said appeal good, then the above obligation to be void, else to remain in full force and virtue.

HENRY CLAIRMONT. [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By CLINTON O. PRICE, *Attorney in Fact.*

[CORPORATE SEAL.]

Signed, sealed and delivered in the presence of
CHAS. B. COLEMAN.

The bond on writ of error in this case is hereby fixed at the sum of three hundred dollars, and the above bond in that amount, with the foregoing surety, is hereby approved.

WILLIAM H. HUNT, *Judge.*

Indorsed: Title of court and cause. Bond. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk.

45 And thereafter, to-wit, on the 17th day of February, 1910, a Writ of Error was duly issued herein, which said Writ of Error with return thereof is hereto annexed, being in the words and figures following, to-wit:

46 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Writ of Error

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the District Court of the United States for the District of Montana, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment and the sentence of the court, wherein the defendant was sentenced to sixty days in jail and to pay a fine of One Hundred Dollars for the alleged violation of Section 2139 of the Revised Statutes of the United States, for introducing liquor upon the Flathead Indian Reservation, a manifest error has happened, to the great damage of said Henry Clairmont, as appears from the papers herein; we being willing that the error, if any has been committed, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington, District of Columbia, on the 18th day of
47 April, 1910, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the fifteenth day of February, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America the one hundred and thirty-fourth.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States for the District of Montana.

The above writ of error is hereby allowed by

WILLIAM H. HUNT,
District Judge.

48 *Return to Writ of Error.*

Answer of Court to Writ of Error.

The Answer of the Honorable the United States District Judge for the District of Montana to the Foregoing Writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said District Court, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

49 [Endorsed:] No. 1327. In the District Court of the United States for the District of Montana. United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Writ of Error. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk. O. W. McConnell, Attorney for Defendant.

50 And thereafter, to-wit, on the 17th day of February, 1910, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to-wit:

51 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Citation

UNITED STATES OF AMERICA, *ss:*

To George W. Wickersham, Attorney General of the United States, and to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Montana, wherein the United States of America is plaintiff and Henry Clairmont is defendant, to show cause, if any there be, why the judgment and sentence of the court rendered against the defendant, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the said defendant, Henry Clairmont, in that behalf.

Given under my hand in the City of Helena, in the District of Montana above named, this seventeenth day of February, in the year of our Lord one thousand nine hundred and ten.

WILLIAM H. HUNT,
Judge of the District Court of the United States, District of Montana.

52 [Endorsed:] No. 1327. In the District Court of the United States for the District of Montana. United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Citation. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk. O. W. McConnell, Attorney for Defendant.

53 *Clerk's Certificate to Transcript of Record.*

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing volume, consisting of 53 pages, numbered consecutively from 1 to 53, inclusive, is a true and correct transcript of the pleadings, process, orders, verdict, judgment, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said Court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-two and 50/100 Dollars ($42.50), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Helena, Montana, this 24th day of February, A. D. 1910.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

Endorsed on cover: File No. 22,079. Montana D. C. U. S. Term No. 239. Henry Clairmont, plaintiff in error, vs. The United States. Filed March 29th, 1910. File No. 22,079.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

HENRY CLAIRMONT,

Plaintiff in Error.

vs.

THE UNITED STATES,

Defendant.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, Henry Clairmont, was indicted by the United States Grand Jury, for the District of Montana, charged with having introduced liquor upon the Flathead Indian Reservation in Montana on the 15th day of August, 1908. To this indictment the defendant below entered a plea of not guilty, and the case came on regularly for trial before a jury. Whereupon testimony was introduced, showing that the plaintiff in error, Henry Clairmont, boarded a train of the Northern Pacific Railway Company at Missoula, Montana, having purchased a ticket to Ravalli, Montana, his destination. While sitting in his seat on the train of the Northern Pacific Railway

Company, when the train reached the town of Arlee, a station on the line of the Northern Pacific Railway Company, some miles distant from Ravalli, the place where the plaintiff in error was going, an officer of the Interior Department boarded said train and arrested the plaintiff in error as he sat in his seat upon the train. The officer searched the plaintiff in error on the train and found a small flask of whiskey in the inside pocket of his coat, a portion of which had been drunk. The officer immediately took the flask of whiskey from the plaintiff in error and placed it in his own pocket, and took the plaintiff in error under arrest from the train. Arlee, Montana, is a station on the line of the Northern Pacific Railway Company, as likewise is Ravalli, the place to which the plaintiff in error was going, both of said stations being upon the right of way of the Northern Pacific Railway Company, and both places being embraced within the exterior limits of the Flathead Indian Reservation.

When the Government had rested its case, counsel for the defendant, now plaintiff in error, moved the court to instruct the jury to return a verdict acquitting the defendant, for the reason that it appeared from the testimony of the Government that the liquor was taken from the defendant while he was on a train of the Northern Pacific Railway Company, and not on the Indian reservation, and it was not shown that the plaintiff in error had left the train, or attempted to leave the train, or had introduced, or intended to introduce, any liquor upon the Flathead Indian Reservation.

The court overruled the motion of the defendant, and required the defendant to introduce proof, which was done.

The defendant requested the court to give the jury certain instructions. (Tr. pp. 14 and 15.)

Instruction No. VIII, requested by the defendant, was as follows:

> "If you believe from the evidence that the liquor was taken away from the defendant while on a Northern Pacific train, and that as a matter of fact the liquor was not taken by the defendant upon the Indian reservation, then you should find the defendant not guilty."

This instruction, as well as all of the instructions requested by the defendant, were by the court refused, to which the defendant duly excepted.

Counsel for the defendant excepted to the instructions of the court, and particularly to the instruction of the court to the effect that a party upon a Northern Pacific train, having whiskey in his possession, even though he may be going to some point on the reservation, though he has not left the train, is introducing liquor upon the reservation.

The jury returned a verdict of guilty, recommending the defendant to the mercy of the court.

The plaintiff in error, Henry Clairmont, appeared in court in his own proper person and by his counsel, the court being about to pronounce sentence and judgment upon the defendant, and moved the court to arrest the judgment and assigned some six reasons therefor in his written motion in arrest of judgment. (Tr. pp. 18-19.)

The motion in arrest of judgment was denied, to which the defendant duly excepted, and the court sentenced the defendant to sixty days in the county jail of Lewis and Clark County, Montana, and to pay a fine of $100.00, to which judgment and sentence the defendant then and there duly excepted.

Thereupon the defendant interposed a motion for a new trial, setting up some twelve grounds of error. (Tr. pp. 19-20.) The motion for a new trial was by the court overruled, to which the defendant duly excepted.

A bill of exceptions was prepared, allowed, settled and signed, which is set forth in the transcript in this case.

Thereupon the court certified that the issue involved in this cause is a question of jurisdiction. The verdict, judgment and sentence of the court against the defendant was based upon the ruling of the court that the United States of America had jurisdiction, and the motion in arrest of judgment and the sentence imposed were decided solely on the ground that the United States of America had jurisdiction in said cause, and the issue presented by the defendant was that the United States had no jurisdiction. Whereupon the defendant sued out a writ of error to this court and specified the following:

ASSIGNMENT OF ERRORS.

1. The court erred in refusing to instruct the jury to return a verdict acquitting the defendant at the close of all of the testimony for the Goverment, for the reason that it appeared from the testimony of the Government that

the liquor alleged to have been introduced upon the Flathead Indian Reservation was taken from the defendant while he was on a Northern Pacific Railway Company train; and that he was not on the Flathead Indian Reservation, and it was not shown that the defendant intended to introduce any liquor upon the Flathead Indian Reservation.

2. The court erred in overruling the defendant's motion in arrest of judgment.

3. The court erred in failing and refusing to discharge the defendant, for the reason that the United States of America had no jurisdiction of this action, and no offense was committed by the defendant on territory within the jurisdiction of the United States, for the following reasons:—

(a) That at the time of the alleged offense charged in the indictment the defendant was traveling from the City of Missoula, Montana, on a passenger train of the Northern Pacific Railway Company, that he had not gotten off of said train, or attempted to get off of said train, but was still upon the same at the time of his arrest; that he had not been upon the Flathead Indian Reservation with any liquor or introduced, or attempted to introduce any liquor thereon, but was occupying his seat in the railway coach of the train of the Northern Pacific Railway Company as a passenger thereon.

(b) That at the time of his arrest the defendant was on a train of the Northern Pacific Railway Company, which said train was on a right of way of said railway company, which said right of way had been ceded by a treaty of the Flathead Indians to the United States of America and by the United States of America, by an Act of Congress, had been dedicated and given to the said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest, or at the time of the alleged commission of the offense with which he is charged, for any offense committed on said train.

(c) That the United States of America had no jurisdiction and no power or authority to punish for any offense committed on the train of the Northern Pacific

Railway Company by the defendant, but that the jurisdiction of any offense so committed upon said train was in the State of Montana.

4. The court erred in its instruction to the jury as to what constitutes the Flathead Indian Reservation, and in instructing the jury that a person upon a Northern Pacific Railway train crossing the Flathead Indian Reservation, and on the right of way of said railway company, was subject to the jurisdiction of the United States.

5. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

6. The court erred in passing sentence upon the defendant.

7. The United States Grand Jury had no jurisdiction to present an indictment in this case.

ARGUMENT.

The question at issue in this case is as to whether the United States has jurisdiction on the right of way given by the Government to the Northern Pacific Railway Company across the Flathead Indian Reservation. The right of way of said railway company extends across the Flathead Indian Reservation from east to west, and the question for determination in this case is as to whether this right of way of the Northern Pacific Railway Company is a part of the Flathead Indian Reservation, or whether the Government has parted with its title to the right of way so that it does not have jurisdiction over the same.

The plaintiff in error contends that Flathead Indians ceded, by agreement and convention, all of their rights and claims

to the United States for a strip of ground 200 feet in width on each side of the center of the track of the Northern Pacific Railway Company, and the Indians were paid a consideration therefor. We further contend that the United States of America, by Act of Congress, conveyed to the Northern Pacific Railway Company this right of way, giving the railway company the right of exclusive possession and extinguishing the right of occupancy by the Indians, and made no reservation or provisions retaining jurisdiction over the strip or right of way relating to the sale or introduction of liquor thereon. The plaintiff in error contends that the Act of Congress granting the right of way had the effect to convey to the railway company the title in fee to said right of way, so that neither the Indians nor the United States had any title whatever to this strip of ground or any jurisdiction over it; in other words, the plaintiff in error contends that the right of way of the Northern Pacific Railway Company constitutes no part of the reservation.

THE GRANT TO THE RAILWAY COMPANY.

The right of way to the Northern Pacific Railroad Company, the predecessor in interest of the Northern Pacific Railway Company, over the Flathead Indian Reservation was granted by the Act of Congress of July 2, 1864. The grant of the right of way made by Section 2 of said Act is as follows:

"That the right of way through the public lands be,

and the same is hereby, granted to said 'Northern Pacific Railroad Company', its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill."

13 Statutes-at-Large 365, Chap. 117.

EXTINGUISHMENT OF INDIAN TITLE.

Pursuant to the last clause of Section 2, of the Act of Congress of July 2, 1864, the United States proceeded to extinguish the title of the Flathead Indians to the land across the Flathead Indian Reservation, and there was a convention of the Flathead Indians, by which they agreed to sell to the United States a definite tract of land 200 feet in width on each side of the track for the purpose of a right of way for the Northern Pacific Railroad Company. The minutes of the convention may be found in Executive Document No. 44, Forty-seventh Congress, second session. An agreement was made and entered into between the Flathead Indians and the

United States on September 2, 1882, by which all right and claim of every kind of the Indians to this right of way was extinguished, the consideration therefor being paid by the Northern Pacific Railroad Company.

On July 4, 1884, Congress provided for the payment of the sum of $16,000.00 to the Flathead and other tribes of Indians in Montana Territory for the right of way of the Northern Pacific Railroad Company over and through their reservations, which was "to be paid in accordance with an agreement between the tribes and the United States on September 2, 1882, and being the sum paid to the United States by the Northern Pacific Railroad Company in part payment of said right of way, which agreement is hereby ratified."

23 Statutes-at-Large, p. 89.

The Indian title to the right of way granted to the railroad company was extinguished. It then becomes pertinent to inquire what kind of a title was granted to the Northern Pacific Railroad Company by the Act of Congress of July 2, 1864, whether it was a title in fee, or merely an easement. That the Northern Pacific Railroad Company complied with all of the terms and conditions of the Act of Congress of July 2, 1864, we think is conceded and it is unnecessary to cite the other provisions of this act and the acts of compliance of the railroad company. It is only necessary to ascertain what construction is properly placed upon Section 2 of this act to ascertain the nature of the grant, whether it was in fee or simply an easement.

This court has passed upon and construed this act, and has held:

> "That the *fee* passed by the grant made in Section 2 of the act of July 2, 1864."

In the case of

> Northern Pacific Railway Company vs. Townsend, 190 U. S. 267; 23 Sup. Ct. Rep. 671,

Chief Justice White construed the grant of the Government to the Northern Pacific Railroad Company. In that case the court said:

> "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U. S. 171; St. Joseph & Denver C. R. Co. v. Baldwin, 103 U. S. 426), it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864. * * * * * * *
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> "The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same as long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * * * To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.

"Of course nothing that has been said in anywise imports that a right of way through the public domain within a state is not amenable to the police power of the state."

When the act of July 2, 1864, was passed, the grant by the Government passed the title in *fee* to the land *at that time*, regardless of the fact that the Indians still had the right of occupancy. But, as we have seen, this right of occupancy was given up and all Indian title of every kind was extinguished by the agreement of September 2, 1882.

This court on another occasion decided that the grant by the act of Congress on July 2, 1864, to the Northern Pacific Railroad Company operated to *convey the fee to the company*, in the case of

Buttz vs. Northern Pacific Railroad Co., 119 U. S. 55; 7 Sup. Ct. Rep. 100.

In that case Justice Field said:

"The land in controversy, and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as 'Indian country.' At the time the act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee in the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the Goverment. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. * * * * * * * *

> "In the grant to the railroad company, now before us, Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its extinguishment by the United States as rapidly as might be consistent with public policy and the welfare of the Indians. In compliance with the pledge thus given, the United States took steps, first, to obtain from the Indians the right to construct railroads, wagon roads and telegraph lines across their lands and to make such other improvements upon them as the interests of the Government might require, and afterwards to obtain a cession of their entire title."

In the case of the right of way across the Flathead Indian Reservation the title in fee of the land was granted to the railroad company by the act of July 2, 1864, and on September 2, 1882, the United States extinguished all of the Indian title or right of occupancy by the Indians to said lands upon a substantial consideration paid by the railroad company to the Indians, thereby giving the railroad company the absolute right and title to the right of way.

This court passed upon a similar grant of a right of way to that given to the Northern Pacific Railroad Company in the construction of the act granting a right of way to the Atlantic & Pacific Railroad Company, in the case of

Territory of New Mexico vs. United States Trust Co., 172 U. S. 186; 19 Sup. Ct. Rep. 131.

In that case the term "right of way" was defined, and it was held that the term did not mean the right of passage merely, but that it conveyed the land itself, and not the right of passage over it. Mr. Justice McKenna, in delivering the opinion of the court, says:

"What, then, is meant by the phrase, 'the right of way?' A mere right of passage, says appellant, per contra, appellee contends that the fee was granted; or if not granted, that such a tangible and corporeal property was granted that all that was attached to it became part of it and partook of its exemption from taxation.

"To support its contention, appellant urges the technical meaning of the phrase 'right of way', and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context and the intention of the legislature otherwise indicated. Examining the statute, we find that whatever is granted is exactly measured as a physical thing, not as an abstract right. It is to be 200 feet wide, and to be carefully broadened so as to include grounds for the superstructure indispensable to the railroad.

"The phrase, 'right of way,' besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are:

"Mr. Justice Blatchford said in Joy vs. St. Louis, 138 U. S. 44, 11 Sup. Ct. 256: 'Now the term, 'right of way', has a two-fold significance. It is sometimes used to describe a right belonging to a party,—a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.' That is, the land itself, not a right of passage over it."

Continuing, the court said:

"But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted,—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property. * * * The interest granted by the statute to the Atlantic & Pacific Railroad Company, therefore, is real estate of corporeal property, and the principles of such apply."

Even though the United States had not by treaty and agreement of September 2, 1882, extinguished the right of the Indians to the tract of land for the right of way of the Northern Pacific Railroad Company over the Flathead Indian Reservation, the grant, as contained in the act of Congress, conveying the right of way to the railroad company, operated of itself, to extinguish the Indian right, for the grant by the Government to the railroad for the right of way necessarily involved the possession of the land as a railroad right of way, and this of itself would terminate the Indian right of occupancy. This court in the case of

> Missouri K. & T. Ry. Co. vs. Roberts, 152 U. S. 114; 14 Sup. Ct. Rep. 496,

in construing the act of Congress granting to the southern branch of the Union Pacific Railway Company a right of way, subsequently located through the Osage Indian Reservation, held that:

> "The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of 200 feet as a right of way to the company * * * No stipulation was made when the grant of the right of way through the Osage Reservation was made, but the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration. * * * The right of the United States to dispose of the fee in the land occupied by them, has always been recognized by this court from the foundation of the government."

The case just quoted from this court held that the government had the right and power to dispose of the fee in the lands in controversy occupied by the Osage Indians, together with their right of occupancy, and that the act of Congress granting the right of way, conveyed both the fee and possession of the land to the railroad company.

The grant by Congress of a right of way over the public domain takes effect from the date of the grant and is absolute in character and conveys the whole of the land to the railroad company, to whom the grant is made. Congress granted to the St. Joseph and Denver City Railroad Company a right of way through the public domain. An individual undertook to settle upon a portion of this right of way granted after the act of Congress granting the right of way, but before the definite location of the railroad over it. It was held by this court, in the case of

Railroad Company vs. Baldwin, 103 U. S. 426;

> "That the grant which the act of July 23, 1866, makes to the St. Joseph & Denver City Railroad Company to the extent of 100 feet in width on each side of said railroad where it may pass through the public domain is absolute and *in praesenti*, and a party subsequently acquiring a parcel of such lands takes it subject to that right."

It will be noted that the grant from the Government to the Northern Pacific Railroad Company is *in praesenti*, the language being that the right of way "*is hereby granted* to said Northern Pacific Railroad Company, its successors and assigns."

The parcel of land granted is definite in width and length. The Indian title to the land over the Flathead Indian Reservation was extinguished in the agreement between the Indians and the United States, and for the consideration of several thousand dollars paid by the Northern Pacific Railroad Company for the right of way over the reservation. It would seem that there can be no question but that the United States granted, and the railroad company acquired, an absolute title in fee to the right of way 400 feet in width.

EFFECT OF GRANT.

The effect of the act of Congress granting the right of way over the Flathead Indian Reservation to the Northern Pacific Railroad Company was to *withdraw such right of way from the operation of the former act of reservation.* It eliminated from the Flathead Indian Reservation a strip of land 400 feet wide from the east to the west thereof, through which the railroad ran along its right of way.

In the case of

Maricopa & Phoenix Railroad Co. vs. Territory of Arizona, 156 U. S. 347; 15 Sup. Ct. Rep. 391,

it was held that:

> "An act of Congress granting to a railroad a right of way, and authority to construct and operate a railroad thereon through an Indian reservation, created by Congress, within the limits of a territory previously organized, in the absence of any treaty with the Indians preventing such grant, withdraws the land from the act of reservation, to the extent of the grant and for the purposes thereof,

and re-establishes over the property and rights withdrawn the authority of the territory, including the power to tax."

Mr. Chief Justice White, delivering the opinion of the court in that case, said:

"The consent of Congress to the railroad entering on the land and using it as therein provided, was a valid exercise of power. Its necessary effect was to the extent of the grant and for the purposes thereof to withdraw the land from the operation of the prior act of reservation, and the immediate consequences of such withdrawal, so far as it affected the property and rights withdrawn, was to re-establish the full sway and dominion of the territorial authority."

Railway vs. Fisher, 116 U. S. 28; 6 Sup. Ct. 246.
Harkness vs. Hyde, 98 U. S. 476. * * * * *

"It is wholly immaterial whether the rights vested in the corporation by the act of Congress, were rights of ownership, or merely those which result from the grant of an easement. Whatever they were, they were taken out of the reservation by virtue of the grant and came to the extent of their withdrawal under the jurisdiction of the the territorial authority."

The act of Congress granting this right of way is similar to that granting the right of way to the Northern Pacific Railroad Company. The necessary effect of this grant was to withdraw the land embraced in the right of way granted to the Northern Pacific Railroad Company from the operation of the prior act of reservation. This right of way ceased to be, and was, no longer a part of the Flathead Indian Reservation. The withdrawal was limited to the extent of the grant and for the purposes thereof. The extent of the grant was the full

width of the right of way designated in the grant, or 200 feet in width on each side of the railroad where it passed through the reservation. The purpose of the grant was to confer upon the railroad company a fee simple title and right of ownership and perpetually embracing exclusive possession. The immediate consequence of such withdrawal, so far as it affects the property and right withdrawn, was to establish the full sway and dominion of territorial authority. It is wholly immaterial whether the rights vested in the railroad by the act of Congress were rights of ownership, or merely those which result from the grant of an easement, because, whatever they were, they were taken out of the reservation by virtue of the grant and became, to the extent of their withdrawal, subject to the jurisdiction of territorial authority. Even though the grant may have conveyed only a limited fee, subject to revert to the Government, if the railroad company failed to use the right of way granted for the purposes for which it was granted, as was held in the case of Northern Pacific Railway Company vs. Townsend, supra, still if the railroad company occupies its right of way with its roadbed and its other necessary superstructures, and uses the same for railroad purposes, its fee simple title is as perfect and complete as if no such limitation was attached to it.

Since the Indian title to the land has been extinguished by agreement, and the Government has parted with the legal title to the strip of land embraced in the right of way, there is nothing left in the Government upon which its jurisdiction can

rest. The effect of such grant was to re-establish the full sway and dominion of the State's authority. There was no room for the exercise of the police power of the United States upon this right of way when the authority of the State was re-established. By the grant of this land to the railroad it was withdrawn from the Flathead Indian Reservation and it was no longer a part of. This right of way cannot be considered *Indian country* simply because it was formerly a part of the Indian reservation, for

> "Indian lands cease without any further act of Congress to be *Indian country* after the Indian title has been extinguished."
>
> Bates vs. Clark, 95 U. S. 204, 208, 209.

JURISDICTION.

It is a logical conclusion that the United States has no jurisdiction over the right of way of the Northern Pacific Railway Company across the Flathead Indian Reservation, by reason of the fact that it has granted and conveyed said land covered by the right of way to the railway company. The Indian title has been extinguished. The Indians no longer occupy the land, nor have any right of occupancy. The railway company is in exclusive possession, ownership and control thereof. The land was withdrawn from the Flathead Indian Reservation, and the effect of this withdrawal was to establish the supremacy, authority, sway and dominion of the State of Montana over this right of way. If a crossing is necessary to be established for a highway across the right of way of the

railroad as it crosses the Indian reservation, the jurisdiction rests in the officers of the State to compel the installation of such a crossing. If a crime is committed on the strip of ground covered by the railroad right of way as it passes over the Flathead Indian Reservation, conveyed by the Government to the railroad, the jurisdiction for the punishment of this crime is in the courts of the State of Montana, and not in the courts of the United States. There are many police regulations prescribed by the laws of the State of Montana touching the conduct of railway companies in the operation of their trains. Railroads in Montana are required to slow down and come to a standstill at the crossing of another railroad track. They are required to post notices at each station of the time of arrival and departure of trains. They are required to erect and maintain fences along the line of their roads and to build cattle guards at crossings. There are other regulations governing railroads operating in the State of Montana coming within the scope of what is known as the police power of the State. Would it be contended for a moment that when a train of the Northern Pacific Railway Company crosses the boundary of the Flathead Indian Reservation and enters upon that part of its right of way lying within the geographical limits of the reservation, that the railway company is instantly freed from the operation of these police regulations? Would it be contended that the railway company passing through this reservation on its right of way, to which it has complete control, is subject only to the police power of

the United States? There can be no divided sovereignty. Either the State of Montana has jurisdiction over this right of way or the United States has.

> "The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all state legislation."
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> Ex parte Dick, 141 Fed. 5.

In speaking of the limit of the police powers of the General Government, the Supreme Court of the United States said, in the case of

> In re Heff, 197 U. S. 505; 25 Sup. Ct. Rep. 506:
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> "In this Republic there is a dual system of government, —National and State. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation, that in its exercise the state may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction."

The court further says in this case:—

> "It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."

One of the police regulations of the State of Montana is that there shall be no drinking upon any passenger train of a railroad company, and power and authority is given the conductors of railroad trains to make arrest of any person violating this penal statute of the State. If, then, the defendant, Henry Clairmont, was drinking upon the train of the Northern Pacific Railway Company at and prior to his arrest by a Federal officer, he could have been arrested under the State law, but not under any Federal statute. The police power of the United States does not extend over this strip of land to which neither the Government nor the Indians have any title, but the right and authority does extend to and is conferred upon the State of Montana.

The case of

United States vs. Four Bottles of Whiskey, 90 Fed. 720,

was one involving the introduction of liquor on an Indian Reservation. Under the laws of the United States relating to the entry of mineral lands, a valid mining claim was located upon the Colville Indian Reservation, and a stock of spirituous liquors was placed upon this mining claim and a saloon established thereon. The court in that case held that:

> "The effect of such a valid location is to segregate the claim from the reservation and extinguish the Indian title thereto, which is merely possessory, so that the land embraced in such location ceases to be Indian country within the meaning of the Revised Statutes, Sections 2139 and 2140, and 29 Statutes, p. 506, Chapter 109, prohibiting the introduction of liquors into the Indian country, and becomes subject to the jurisdiction of the State."

The court, in the case last cited, held that the party introducing liquor upon the mining claim was not guilty of violating the penal statutes of the United States forbidding the introduction of spirituous liquors upon an Indian reservation. Wherein does the principal involved in the case cited differ from the principle involved in the case at bar?

"Congress, having ceded to a railroad company a strip of land running through a portion of the public land set apart for an Indian reservation, the land so ceded was thereby withdrawn from the reservation and became subject to the laws of the territory within the limits of which it was situate."

Utah & N. Ry. Co. vs. Fisher, 116 U. S. 28; 6 Sup. Ct. Rep. 246.

See also;

Maricopa & P. R. Co. vs. Arizona, 156 U. S. 347; 15 Sup. Ct. Rep. 391.
Thomas vs. Gay, 169 U. S. 264; 18 Sup. Ct. Rep. 343.
Truscott vs. Hurlbut Land & Cattle Co., 73 Fed. 60.
King vs. McAndrews, 104 Fed. 434.

As we have seen, the Indians' title or right of occupancy to the right of way of the Northern Pacific Railway Company has been completely extinguished. The Indians have sold it for a valuable consideration. We have further seen that the act of July 2, 1864, granting the right of way to the Northern Pacific Railroad Company, passed to that company the fee or complete title, so that neither the Indians nor the Government of the United States have the slightest right or title to the

right of way under consideration. Upon what, then, we ask, can the jurisdiction of the United States be based to enforce a penal statute against a party while riding upon one of its trains over this right of way? Clairmont was neither in nor on the Flathead Indian Reservation. He was seated in a car on one of the railroad trains of the Northern Pacific Railway Company. He was not getting off, or attempting to get off, or intending to get off, so as to go upon the Indian Reservation. We therefore respectfully insist that he did not introduce any liquor upon the Indian reservation.

Suppose that Henry Clairmont had shot one of the passengers on the train of the Northern Pacific Railway Company at the time and at the place at which he was arrested on the railway train. Would it be contended for a moment that the United States would have jurisdiction to try and punish the defendant for the murder of the person so killed by him? Without question the State of Montana would rightfully have assumed jurisdiction and tried the defendant for the offense committed on the train. We therefore respectfully submit that the United States had no jurisdiction over the defendant at the time and place that he was arrested. At the time and place he had committed no offense and violated no law of the United States. He had not introduced any liquor upon the Flathead Indian Reservation. He could not have introduced any liquor upon the Indian reservation so long as he was riding upon the train of the railway company, which was proceeding along its right of way, to which the railroad had title and of

which the Government had divested itself and eliminated it from the Indian reservation.

We therefore respectfully submit that the United States had no jurisdiction over the defendant for any offense committed on said train. The sole and exclusive jurisdiction of any offense committed on the train was in the State of Montana. The grand jury had no jurisdiction to indict the defendant, nor the District Court to try the defendant. The defendant's motion to be discharged, after the introduction of the Government's case, should have been sustained. The defendant's motion in arrest of judgment challenging the jurisdiction of the court should not have been overruled. For the manifest errors of the court below in assuming jurisdiction of this case, and the punishment of the defendant, this case should be reversed

N. W. McCONNELL,

O. W. McCONNELL,

Attorneys for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

HENRY CLAIRMONT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES, DEFENDANT.
} No. 239.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The question, in brief, is whether section 2139 of the Revised Statutes, and subsequent acts, which makes it an offense to introduce liquor into the Indian country, is applicable to the introduction of liquor into the strip of land 200 feet wide which constitutes the Northern Pacific Railroad right of way across the Flathead Reservation in Montana.

The plaintiff in error was arrested while on a train of the Northern Pacific Railroad on this right of way. He was not in transit across the reservation but was intending to leave the train at an approaching station called Ravalli, which is within the reservation.

The arresting officer testified that the defendant was drunk and that upon a search he (the officer) found a pint of whisky on his person. (Tr., p. 10.)

The Act of 1897 (29 Stat., 506), under which the conviction was had is as follows:

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars

for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

ARGUMENT.

I.

Beyond question the Indian land title in this strip had been entirely extinguished.

The deed of the United States to the Northern Pacific Railroad (13 Stat. L., 365) transferred the fee with at most a possibility of reverter (*Northern Pacific Railroad Co.* v. *Townsend*, 190 U. S., 267; *Buttz* v. *Northern Pacific Railroad Co.*, 119 U. S., 355), and the deed from the Indians to the United States was even broader, although, in view of the preambles, it might be construed as leaving to the Indians a possibility of reverter (Ex. Doc. No. 15, 48th Cong., 1st sess., reprinted as Appendix B hereto).

II.

There is nowhere any express provision for the retention of any Federal police power over this strip, excepting that statements were made by the representative of the United States in the council with the Indians which preceded their deed to the

effect that no liquor would be sold "on the reservation at the depots;" that after the road was built there would be "no white men to sell liquor," and that "the white people will not be allowed to go on the reservation." We have italicized in the report of this council, which is printed as Appendix A hereto, various other expressions tending to show that the Indians were assured that the restrictions would not be withdrawn from this strip and that the land was to be surrendered only for the limited purpose of a railroad.

This informal and parol agreement, and the fact that the grant was made for the limited purpose, and the physical situation of the strip in reference to the reservation and in its contact with the Indians tend to assimilate the case to *Dick* v. *U. S.* (208 U. S., 340), in which the Federal liquor laws were held to persist notwithstanding the extinguishment of the Indian title, the allotment of lands in severalty, the granting of citizenship to the Indians, and the incorporation of the lands within the limits of a State. It is true that in that case the reservation of the Federal power was made formally and by definite and explicit treaty stipulation.

III.

In the Montana enabling act (25 Stat. L., 677) which was passed in 1889, the United States seems to have reserved its jurisdiction with reference "to unappropriated public lands" (which might include this strip in view of the possibility of reverter)

"to all lands lying within said limits owned or held by any Indians or Indian tribes" and "until the title thereto shall have been extinguished by the United States." The section in full as follows:

> SECOND. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, *and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;* that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the

Rider A.

End of Article II, p. 4.

Here, though there was no formal or explicit treaty stipulation, the continuation of the Federal power is still fairly to be implied from the facts of the physical situation of the land and the limited purpose of the grant to the Northern Pacific Railroad, and also from the contemporaneous promises made by the Commissioner in the council at which he negotiated the deed from the Indians. (Appendix A.) Thus, in *United States* v. *Payne* (8 Fed. Rep., 883, 895), the decision was based on implications of the treaty and the situation of the land relinquished relative to other Indian lands, and also the purpose for which the Indian title was extinguished.

> a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

IV.

In view of these conditions the decisions of this court in *Maricopa & Phoenix Railroad Co.* v. *Arizona* (156 U. S., 347) and *Bates* v. *Clark* (95 U. S., 204, 208, 209) may perhaps finally dispose of the case.

The *Maricopa* case involved a question of the territorial power to tax the right of way across an Indian reservation, but the actual decision may be distinguished on the ground that a State power to tax is involved within the purpose of the grant and is not inconsistent with the continuation of the requirements of the reservation in reference to matters disassociated from the purpose of the grant. So the court said, referring to the grant of the railroad right of way across the reservation, that—

> Its necessary effect was, to the extent of the grant and for the purposes thereof, to withdraw the land from the operation of the prior act of reservation.

Utah & Northern Railway v. *Fisher* (116 U. S., 28) was cited in this connection, and there again the court seemed to imply that the grant of a railroad right of way took the land out of the reservation only in so far as was necessary for the particular purposes of the grant.

The court said:

> It is contended by the plaintiff that these stipulations (that is, of the treaty) can not be carried out if the laws of the Territory are enforced on the reservation; and in support of the position special emphasis is placed upon the clause in regard to persons passing over, settling upon, or residing in the Territory and the clause touching wrongdoers among the Indians. As these treaty provisions have the force and effect of a law, it is insisted that the reservation is excluded from the general jurisdiction of the Territory as effectually as if the exclusion was made in specific terms.
>
> To uphold that jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the treaty stipulations, and might thus defeat provisions designed for the security of the Indians. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind, where the subject matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be

> impaired by taxing the road and property used in operating it.
>
> * * * * *
>
> By force of the cession thus made the land upon which the railroad and other property of the plaintiff are situated was, so far as necessary for the construction and working of the road and the construction and use of buildings connected therewith, withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed (pp. 31, 32).

The territorial power to tax the railroad line is not necessarily inconsistent with the continuation of the Federal police power for purposes of the discharge of the duty toward the Indians.

> *United States* v. *43 Gallons of Whiskey* (93 U. S., 188; 108 U. S., 491).
>
> *United States* v. *McBratney* (104 U. S., 621).
>
> *Thomas* v. *Gay* (169 U. S., 264, 277).
>
> *Draper* v. *U. S.* (164 U. S., 240).
>
> *Truscott* v. *Hurlburt Land & Cattle Co.* (C. C. A.), (73 Fed., 60).

Bates v. *Clark, supra*, differs on its facts from this case in an essential particular, namely, that the *locus in quo* there concerned had been ceded by the Indians for purposes of white settlement and for all purposes, and their interest and relation thereto had been withdrawn. The land concerned was not within the general domain of a reservation. The very pur-

pose and intent of the grant was to dissociate the lands from the Indians and open them up for white settlement. This appears from the full statement of the facts in the report of the decision of the lower court (46th Northwestern Reporter, 510). The extinguishment of the legal title for such purposes and under such circumstances would very naturally carry with it an implication that the laws enacted for the protection of the Indians were to be no longer applicable, and the court stated that the extinguishment of the Indian title would not withdraw the lands from "Indian country" if "by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable."

Here, however, from all practical, human and public points of view, this little piece through the heart of the Indian country, granted merely for a railroad right of way and with no view to white settlement, was still "Indian country." The actual human relation of the Indians to the strip was not substantially changed by the mere extinction of their legal property title to the lots concerned. The only population which was related to the strip was Indian, as it always had been, and their interests were as vitally dependent upon the exclusion of liquor from the strip as from any other single lot in their reservation. Apparently, as we have shown from the proceedings of the council, the Indians understood and expected and were assured by the representative of

the Government that the *status quo* would be continued excepting only with reference to railroad operation.

The *locus in quo* was a part of a tract definitely set apart as a *reservation* for exclusive occupancy by the Indians. (12 Stat., 940.) It therefore possessed its character as Indian country more because of the specific action by Congress than by reason of the original general definition of Indian country. (4 Stat., 729.) Here was a later affirmative and special act of Congress which might well fall within the meaning of this court in stating the exception to the rule in *Bates* v. *Clark, supra*, to the effect that the extinguishment of the Indian title will not revoke the operation of the liquor laws if by treaty with the Indians or some act of Congress a different rule is made applicable.

Unless such a situation is ruled by the *Maricopa case*, and the *Fisher case, supra*, even in reference to the liquor traffic, there appears to be no authority directly on the subject, excepting that Judge Hanford in the District Court for the District of Washington, held that introducing liquor and establishing a saloon in a mining claim which lay within the boundaries of an Indian reservation was not illegal. (*U. S.* v. *4 Bottles Sour Mash Whiskey*, 90 Fed., 720.) On the other hand, Attorney General Griggs rendered an opinion reported in 22 Ops. A. G., 232, in which he held that the establishment of a distillery on lands in the Indian Territory was illegal, notwithstanding the

Indian legal title to the particular piece of land had become extinct. His reasoning in this particular is as follows:

> Just to what extent over this vast territory thus described as Indian country the Indian title must be extinguished in order that, under the decision referred to, a particular locality therein shall cease to be Indian country is not apparent. But, in view of the evident object and purpose of Congress in this and kindred legislation to prevent the introduction of intoxicating liquors among the Indians or into localities inhabited by them, it is obvious that much more in this direction is required than that the Indian title shall be extinct as to the particular lot or parcel of land on which the distillery is erected or proposed to be erected.
>
> In view of this and of existing facts in the Indian territory, the question submitted is somewhat indefinite. You ask in substance whether there is anything in the laws of the United States that prevents the establishment of a distillery in the Indian territory "*on lands therein* when the Indian title is extinct"?
>
> If this means merely that the Indian title to the particular lands on which the distillery is proposed to be erected is extinct, the first part of the question should be answered in the affirmative, while if it means that the Indian title is extinct there over such an extent of territory as that such territory has, under the doctrine of *Bates* v. *Clark*

(*supra*), ceased to be Indian country, then the section above referred to does not itself prohibit such distillery.

The judgment should be affirmed.

WINFRED T. DENISON,
Assistant Attorney General.

LOUIS G. BISSELL,
Attorney.

APRIL, 1912.

APPENDIX A.

PROCEEDINGS OF THE COUNCIL.

Council held by Hon. Joseph K. McCammon, Assistant Attorney General, appointed by the Secretary of the Interior to negotiate an agreement with the Indians on the Flathead Reservation for right of way for the Northern Pacific Railroad through the reservation.

AUGUST 31, 1882—3 p. m.

Present: Arlee, Adolphe, Eneas, and Michelle, with headmen and Indians of the Flathead, Pend d'Oreilles, and Kootenais Tribes.

Agent RONAN said: Mr. McCammon is here from Washington, representing the United States Government, to meet the Indians in council; and it is desired to have them listen attentively. He is here with the voice of the Great Father, and brings his words to the Indians. I have no further words of introduction.

Commissioner MCCAMMON. My friends of the Flathead, Pend d'Oreilles, Kootenais, and other tribes living on the Jocko Reservation: I have been sent by the Great Father at Washington a great many miles to see you and talk with you. He knows how well you have treated the white people these many years; that you have been peaceful and happy, and have taken care of yourselves; that you have always been his friends and the friends of his people. Knowing these things he does not wish to take from you

your lands. He knows, however, that a railroad is to be built on the borders of your reservation. Twenty-seven years ago you and your fathers made a treaty with the whites. That treaty which you and the others made provided for a country here in which you and your fathers should live. In that treaty you and your fathers agreed "if necessary for the public convenience roads may be run through the said reservation." By another treaty, made the same year at the treaty grounds, near the mouth of the Judith River, in Nebraska, which treaty was signed by the Flathead Nation and other Indians, it was provided that "for the purpose of establishing traveling thoroughfares through the country, and better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description, establish lines of telegraph," &c. The Great Father and the Great Council in 1864 gave the Northern Pacific Railroad Company the right to build a railroad through this country. The railroad company now say to the Great Father, "We want to build a railroad through the Jocko Reservation a few miles." The Great Father says, "The Indians on the Jocko Reservation gave me consent, years ago, to have roads of every description built through their lands." He understands that a wagon road has been built and used for some time. That is one kind of road. Another kind of road is a railroad. It is a better and quicker way of traveling. It is a kind of road that other Indians all over the country have allowed to be built. But the Great Father says that he thinks the Indians should be paid for the

little land that will be used by the railroad. He says he thinks the railroad will be good for the Indians as well as for the whites. The building of the road may bring white men on the reservation in order to grade the road, lay ties, &c., but when the road is built no white men will remain except at stations, and there only so many as are necessary. I will now show you a map of your reservation [shows maps]. The railroad is to come up here from the Missoula, entering the reservation by the Jocko River, and then going along the Jocko and Pend d'Oreille Rivers to the west line of the reservation. Now, as all the lands on the reservation belong to the Indians the United States wants to pay, and thinks it right to pay, for 100 feet of road on each side of the track, for a distance of 53.26 miles on this narrow line; and also for five squares of ground alongside, to be used as stations, being about 130 acres in addition, fully described on the map. These stations are where cars will stop to take on passengers, Indians and others, and Indian wheat and grain if you want it carried off to sell; and where goods will be sent or received. This will cover a very small part of the reservation—like a spider web or fly track across the reservation [illustrating]. Your reservation contains about 3,000,000 acres; the railroad will occupy 1,500 acres, just about as much as an ordinary wagon road. Now, the Great Father asks me to inquire of these Indians what will be a fair price for this small tract. He says you ought to be paid a fair, reasonable price, just as much as he would pay a white man, no more and no less. Where the railroad runs through the farms of Indians, those Indians will be paid for their fences, farms, houses, and crops, if interfered with, the money to be paid to each Indian, or to the agent

to be used for them. I am appointed to find out how much this will damage each Indian farm. This refers only to houses, fences, crops, &c., that belong to individual Indians.

MICHELLE. You don't know how much individual Indians will get, do you?

COMMISSIONER. No; that we will determine hereafter. I went last year to Fort Hall Reservation. The Indians there allowed a road to be built, and no white men have come on the reservation because of the road. That is on the same plan as this. *Hundreds of miles of road are built through the Indian Territory, and yet white men are kept out, except the agents of the railroads.* The Northern Pacific Railroad has stopped at the line of your reservation, and wishing well to the Indians, does not want to interfere with them, except by some arrangement so that the Indians may be paid. So the Great Father sends me to ask you what you want to be paid for this land which the railroad company needs. I want you to consider this matter and ask questions. I don't want any one to misunderstand. I want to be just to the Indians. I want to protect their rights. I want them to talk. I am ready to hear from Arlee, Michelle, Adolphe, Eneas, or the head men who know what they want to say.

ENEAS. I presume you will not ask us to answer now. There are some men here who have wild ideas, and we want to adjourn and talk the matter over.

MICHELLE. We don't want to detain you for a lot of humbug. Of course you and the Great Father claim that we ought to be paid for the land taken; we are not to be cheated; we are to be treated just the same as whites.

COMMISSIONER. The Crows last year sold land to this company just the same as you are asked to do. Whatever time you wish will be granted.

ARLEE. I am going to talk not about what you are talking about. The Great Chief don't pity me. I am crowded on both sides. White men go up and down the reservation with cattle. I lose cattle in plenty. I want you to get the whites off the land at the head of Flathead Lake. I am old. I will soon die. There are a lot of young ones. I would like to have them live happy. But they will always be in trouble with white men if they remain so near us. It may be true that the railroad would help the Indians, but I would like to get the whites off the Flathead Lake.

COMMISSIONER. Cattle are driven through the reservation because the treaty provided for it. White men who steal are bad men. There are bad white men and bad Indians. White men punish bad white men when they can find them. Fewer cattle will go through the reservation after the building of the railroad, for then many cattle will go through on cars. I will report your wishes to the Great Father. The Great Father did not know them.

ARLEE. The country we gave to the Government is very valuable. Lots of white men have made independent fortunes in my country. Since twenty-seven years ago, when my forefathers made the treaty and gave you the country east and south of this, you have been digging gold there; that country is very valuable. You must not think there are so few here. Lots of others think of coming over here and living on this reservation. Be sure to tell the Great Father my wishes.

MICHELLE. I and Eneas think as does Arlee.

COMMISSIONER. Tell him I (not the Great Father) think if they want that country up north they should have it. I will tell the Great Father. They got the price they asked for their land; they sold it to the white man. Gold was not yet discovered there. They yet have fine lands, noble rivers, and majestic mountains.

RONAN. In my talks I feel as if I knew what Arlee wished to say. On the north side of the Flathead Reservation there is a narrow tract of United States land. Arlee fears that strip will be settled by whites, and Arlee feels if the Great Father will let the Indians have that then they will not be surrounded by whites.

SEPTEMBER 1, 1882—1.40 p. m.

Commissioner MCCAMMON. My friends, I am glad to see you to-day, and hope your hearts are good towards the Great Father. I will be pleased to hear what the chiefs have to say. If there is anything they don't understand in the talk of yesterday I will try to make it clear. I am ready to hear from them now.

ENEAS. I am the chief and you see me now. I have not doubt you are sent to see us by the Great Father. I am the chief and this is my country. I am not joking in telling you I would like to get the Flathead Lake country back. There are things that the Government promised me in that treaty that I have never seen. The Government promised me everything we needed. The Government told me it would send a blacksmith, and build schoolhouses, and furnish teachers at the agencies to instruct Indians, and a head farmer, and build houses for us. The Government wished us to be like white men, and these were to instruct us. It promised me a tinner, a wagon maker, a plowmaker,

a hospital, and a doctor to look after the sick; and that is the reason we signed the treaty. I was glad to think we were to have these things. We had a big country, and under those conditions we signed the treaty. Seven years after that we learned that the line of the reservation ran across the middle of Flathead Lake. We didn't know that when we signed the treaty. That is the reason we want that country back. Besides, we did not get one-half of the annuities that belonged to us. It was divided among yourselves. You told us that after awhile we would be intelligent and rich and like white men. We are poor now. We try to have whites to assist us, and they won't because we are Indians. That is the reason we want to have the whites kept out of that Flathead Lake country.

COMMISSIONER. I am glad to hear Eneas. I know what a good man he is. Major Ronan has told me what wrong has been done years ago; he can now trust Major Ronan; what he gets he gives the Indians. One reason why the Great Father forgot the Flatheads is that they have been so far from Washington; but now when the railroad is built they will be within four or five days from Washington; and the Great Father and his people will see and pity the Indians. That is one thing the Great Father means when he says the Indians will be benefited by the railroad. I will tell the Great Father about Eneas's desires, and do all I can to carry out his wishes.

ARLEE. What is the reason you are not able to treat with the Indians about that country? You have full power.

COMMISSIONER. Arlee is mistaken; I have not power to treat about everything. As I said yesterday, the Great Father did not know what your wishes were

about that strip of land. He only knew about the railroad, and he told me to agree to pay for the land to be used by the railroad. The land is not taken by the railroad, but is taken by the Great Father, who lets the railroad use it. Possibly you will understand my power by an example. You are a chief of your tribe; you send one of your young men to fish; but he goes off to visit his friends miles away; you are waiting for your fish all the time; the young man had no right to visit his friends until he got his fish. So I have no right to do more than the Great Father told me, but must return to him. Do you understand?

ARLEE. I understand.

COMMISSIONER. That is my position.

ARLEE. Is it true the Great Father don't know of the men north of the Flathead Lake?

COMMISSIONER. The country there belongs to the Great Father, so whites have a right to go there; but I will tell the Great Father all you say. It is all written down.

ARLEE. We will now quit talking about the head of Flathead Lake.

COMMISSIONER. Now, I will be glad to hear about the money to be paid for the use of the land for the railroad.

ENEAS. You know what I said, that the Government did not give half it agreed about annuities; and I think I don't wish the road to pass through this reservation. The Great Father is a good man, and when the Great Father tells me a thing I do it. I wish the Great Father to do me a favor and consult my wishes, and not let the road go through this reservation. There is a good way down the Missoula to Horse Prairie. You are a great people, and when you want to do a thing you can do it. What makes

you think the railroad can't go down there? This reservation is a small country, and yet you want five depots upon it. These are the best spots on the reservation. What is the reason I should be encouraged when you take the best part of my country? My country was like a flower and I gave you its best part. What I gave I don't look for back, and I never have asked for it back. The Great Father gave it to us for three tribes, Flathead, Upper Pend d'Oreilles, and Kootenais. What are we going to do when you build the road? We have no place to go. That is why it is my wish that you should go down the Missoula River. I am not telling you that you are mean; but this is a small country, and we are hanging on to it like a child on to a piece of candy.

COMMISSIONER. The line selected by the railroad company was selected ten years ago, because it was the best route, and because down the Missoula River would not be a good route. The men who selected it then and continued to prefer it are able men, and know the best route; and they say this is the only route that is good. The Great Father believes these men, and he sent me to represent him, not them, in this council. He thinks it is the best route, and the Indians won't be injured, the amount of land to be taken is small. The Great Father has respect for the wishes of the Indians, but he thinks he knows what is best for them, and feeling that way he wants to know what money they want for the land. The Great Father will take care that bad white men do not sell whisky to Indians. He thinks he can do that better with a railroad through your reservation than with one down the Missoula. He wants it here. He says, "You have told me I can build roads through your reservation;" but he also says you shall be paid,

he having pity on you. The Indians should remember they got no pay for the wagon road built through their reservation, but he thinks they should be paid for the land used by the railroad. The amount of land that will be taken by the Government is very small. Only a few pieces of land owned and improved by the Indians will be taken. There is plenty of good land in this and other valleys and reservations, and all that have to move will be paid; they will have the money to pay them for moving, or to do what they please with. I am now talking about improvements. The land belongs to all the Indians, but the improvements to individuals. All the Indians will be paid by the Great Council at Washington for all the land taken, when an appropriation is made, and this money will be used for the benefit of all the Indians; but the money for the fences, houses, and other improvements will be paid to the individual Indians whose improvements are taken. The Great Father has this matter much at heart.

ENEAS. Who established the lines of this reservation? It was the Great Father that got these lines established. Why does he want to break the lines? If we had no lines I would say no word. Lines are just like a fence. He told us so. No white man is allowed to live and work on the reservation. You know it is so in the treaty. That is the reason I say you had better go the other way. Why do you wish us to go away? It is a small country; it is valuable to us; we support ourselves by it; there is no end to these lands supporting us; they will do it for generations. If you say you will give us money for our lands, I doubt if we get it, because we didn't before.

COMMISSIONER. Eneas and the rest do not understand what I said yesterday. The two treaties

signed by your chiefs provide for roads of all kinds through your reservation. The Great Father is not asking for leave to build roads through your reservation; that was given twenty-seven years ago. The Great Father is not treated with great respect when I am told you will not get the money. The matter will be submitted to the Great Council, and the Indians will get the money; and whatever has been done in the past about these matters, you can rely upon the good faith of those who now have control of the Government. I do not understand why this opposition comes, when the Indians gave their faith years ago to the Great Father that this road might be built. I am sorry to hear what has been said. I came here as an honest man to talk to honest men, and I want you to consider well the words of the Great Father.

[An Indian in the audience says, "Railroads are not mentioned."]

The commissioner read from the treaties of July and October, 1855, about roads and continued: You can read it in the paper Arlee has. As I have told you, railroads run through nearly all the reservations in the country. There are a few they do not run through; but where they go Indians see less of whites than they did before, because the whites travel by railroads. This very railroad runs through the Crow Reservation on the Yellowstone. A railroad runs through the country of the Shoshones in Idaho, and this same railroad through the Umatilla Reservation. None of those Indians object to it. They are wise Indians; they have received their money. The Crows and the Bannocks and the Shoshones have received theirs. The Great Father expends the money for the benefit of those Indians. The Great Father will be sorry when

he hears that the Indians do not believe in his good faith. Shall I go back and say to the Great Father that these Indians do not believe he is treating them right? He has but one object, and that is your good; and if I go back without your having named a price for the lands, he will say they are not the good Indians and faithful friends I thought.

MICHELLE. I am going to speak to Indians and no word to white men. I told the agent it was useless for us to oppose giving the white men this strip of land. We don't know the plans of the white man; there is no use of us thinking. Just now he has something to compel. You spoke yesterday of the land at the head of Flathead Lake. I agree with you. That is my wish. You were here yesterday. No word he mentioned was bad. I think it was all good. When you get a gentle horse if you beat him he is bound to get mean; and you are to blame when you beat a dumb brute. He spoke to us gentlemanly; he used no harsh words; and we ought to be glad. We are all Americans. The British line is north, and beyond that are the British Indians. If the President thinks it best for a railroad to run through this land, I am quite willing. It is true this country has been reserved for us. When Garfield came here he told us this was our country; our agent and another big chief from Washington told us the same. Our agent is acting friendly with us. I do not think this gentleman has said a wrong word to us yesterday or to-day. He only wants a little strip of land; he might take it without asking, but he is going to ask us first, and then leave it to the chiefs. It is a thing that is bound to go through anyhow; and so you must not blame your chiefs.

COMMISSIONER. The whole country is not taken from you; just a little narrow strip is used for railroads; you can use it, except the narrow strip for a track and depot grounds. I remember last year, the Great Father, General Garfield, sent me to the Bannocks and Shoshones on this business. You all knew that great and good man, and he knew you and loved the Indians. I have heard that he thought much of you. What he said to me last year about the Shoshones and Bannocks the Great Father said of you this year. Consider well his words and be men. I want to ask Arlee and Michelle if the wagon road has taken the country from them? If not, then a railroad will not. *It is only a road with rail ties and locomotives to go through.*

ARLEE. *We don't think anything bad, but we don't want the railroad to go through the reservation here, because these white men are bad people. At Camas Prairie they sell whisky; they go there and get whisky, and our boys bother us about whisky. This is why we don't want the railroad to go through our reservation, because when the white men come in to work there will be trouble; that is all.*

COMMISSIONER. *About the man who sold liquor, we had him arrested and taken to jail. The same thing will be done by your agent; when he finds white men selling liquor he will arrest them. While the road is being built white men will have to come and build it; but after it is built there will be no white men to sell liquor. On the Crow and Shoshone Reservations no liquor was sold to Indians while the road was being built. It won't be as bad as Arlee thinks; I hope not bad at all for the Indians. No liquor will be sold on the reservation at the depots.*

ARLEE. It was our old people that were good; we had good chiefs; I don't know how many years it is since the white people came, and we have never had fights between us and the whites; nor have we ever killed you at all; and that is why I want to remain in my country quiet and undisturbed. I hear every few days that other tribes of Indians are fighting with the whites; then you win their country. You did not win my country from me at all; the big chief made our lines and told us to stay here all the time, and a few years ago Garfield sent me here to stay. But you don't mind what he said at all. Garfield said, "Take it easy; don't be uneasy." It was nine years ago that Garfield said, "Don't think we will thrust you from that country; that land belongs to you." Last winter I was at home lying down, when they told me men were surveying the place. Some said it did not amount to anything, but I said it would cut our reservation in two; and now to-day I see you here trying to get our land from us for the railroad. But I do not want any railroad here, for this is my country.

COMMISSIONER. This is your country; there is no doubt about that. The Great Father did not send me to ask for your country; he sent me to say he was going to build a railroad across your country, and he wanted to pay you for it. All this country is still yours and will remain yours. He wants you to feel good and remember his kindness. There is no intention to take the country away from you. A railroad is like the wagon road. The wagon road did not take your country from you and the railroad won't. How long has the wagon road been here? Your fathers were good men; they knew the treaty allowed a wagon road, and the same treaty will allow a railroad. The

railroad will help you more than the wagon road. It will keep white people out of your reservation. You can ship grain and all other goods by it. I want you to let me go to Washington and tell the Great Father you believe in his word. I will tell him what faithful children you are; how kind and full of peace and happiness you are. I will tell him of the great sight I saw yesterday; how well you treated me because he sent me. My heart was glad, and I said the Indians will listen to what the Great Father has to say and obey his words. I will again ask you if you can name what money you want for this right of way. If you can not, I will name a sum for you. When the railroad is built the Great Father will probably come out himself to see his country and you. It is too far from the railroad now.

ADOLPHE. It is true that you only want a small strip of my country; it is true that there will be no white men in our country. All will be glad if you only take a small strip of our country. Look at my hand [uplifted]; this is what they do in Washington. I lift my hand; the President does the same thing. It is true that what you say is in the treaty in regard to roads. In the treaty at Hell Gate in 1855 the Indians said the white men could have railroads through here. Governor Stevens said to Victor, "You are the head chief of three tribes here, and of the whites here, too;" and they said we will talk about this land here by and by; and we are having that talk now. Some time ago I did not know about talking, nor what it was to sign my name; now I know. If the whites are good, I am good. When there is blood on my hands, they are not wet with white people's blood. If what you have told me to-day is true, I will be glad. In this country you see no blood; other countries are stained with

blood. The line of my country extends from earth up to heaven.

COMMISSIONER. I want to talk again about this road going through your reservation. I want to explain to you that the Great Father sells land near and adjoining your reservation for $2.50 per acre. The railroad sells its land for $2.50 per acre near your reservation. It has land down towards the Missoula. I wish to be liberal. The Great Father told me to propose a fair price, and I think that $10 per acre is a fair price for the 1,500 acres. That is four times as much as the Great Father gets for his land. This would make altogether for the land $15,000. The Crows got only about five thousand, and the Shoshones seven thousand, or nearly eight. In addition each Indian will be paid for his fences and barns where this railroad interferes with him. The $15,000 will be for the benefit of the whole tribe.

ARLEE. I object to depots.

COMMISSIONER. Arlee never having seen railroads, don't know the amount of land required. Here is a glass with a few drops of water in it [illustrating]. The whole tumbler represents the reservation, the water the amount of land wanted for the railroad. The railroad wanted six stations; the Great Father said five would be enough. They wanted these for water for the engines. The railroad wanted a strip 400 feet wide; the Great Father said, "No, 200;" the railroad wanted larger and more stations; the Great Father said, "No; five stations, and these must be small ones." The Great Father was thinking of the wishes and the interest of the Indians.

ARLEE. I won't say more now about stations. The railroad down below is not done. The Indian don't know, but the Great Father knows and the

engineers know how much is required. The railroad don't want the Indian lands, nor does the Great Father, but he cares for your interests.

[After a delay.]

COMMISSIONER. Have you anything to say?

ARLEE. I want to know about the depots; what are they?

COMMISSIONER. Every railroad in this country has stations once in 10 miles for water, at the side of the track. If the railroad at Spokane has not stations every 10 miles it is because it is not yet finished. I have here the law of the Great Council, and it says the right of way through the lands of the United States is given for 100 feet each side, and stations for depots, &c., every 10 miles of its road. Let any young Indian read it if you want to hear it.

ARLEE. It is so.

COMMISSIONER. These stations are to accommodate you. We are not trifling with you. Arlee ought to be satisfied.

ARLEE. I want $1,000,000 for it.

COMMISSIONER. The whole reservation would not be worth that.

ARLEE. I thought you were here to help us.

COMMISSIONER. I am. I represent the Great Father as well as the Indians. I offer for the land four times what the Government sells its land near here for—$2.50 per acre. And $10 would be eight times what the Government usually sells its land for. Michelle, Eneas, and Arlee, are you ready to come to an agreement with the Government?

ENEAS. There is one thing I don't understand. How big are these stations?

COMMISSIONER. Eight hundred yards long and 90 yards wide for small ones; and all others about four

times as large, right along the road [shows a sketch and also a map]. I hope Eneas's mind is happy and that he understands.

ENEAS. I understand it now.

COMMISSIONER. I will read to Michelle the agreement drawn by direction of the Great Father.

MICHELLE. When I heard you the first time I was glad, but now when I hear what you offer I do not feel so well, because now you say that all the reservation is not worth $1,000,000. Now I do not agree with you.

COMMISSIONER. I am sorry if Michelle misunderstands me. I do not mean that the land is not worth $1,000,000 to the Indians, but that the same kind of land would bring no more among the whites. I only referred to that as they all refused four times what was the selling price of such land among the whites.

MICHELLE. When a railroad runs through the railroad company will get the money back in one day. They will run through my ranch and take my timber to build it with. I would not take $15,000. I do not mean we will make trouble; I only say we will not take $15,000. If you want to go through, go; but we won't take $15,000. I don't speak now, any more, because you offer only $15,000.

COMMISSIONER. Michelle should understand that what I offer is four times as much as the Government sells the same kind of land for to white men. Don't let him say that $1,000,000 is a fair price; I say I offer what is reasonable. I do not represent the railroad, nor have I anything to do with the railroad; I represent the Great Father.

ARLEE. We have said.

COMMISSIONER. We will not talk any more about the million dollars; the Great Father will not allow us to talk of that.

ARLEE. All right; then go by the Missoula. If the railroad don't want to give the money let it go by Frenchtown.

COMMISSIONER. The Great Father says the railroad is to go here. The railroad, according to the agreement, does not pay the money to the Indians; the United States pays it.

ARLEE. Why do you want to pass here? You have to make a big bend to come here; why not go by the Missoula? The treaty only talked about a trail, not about a railroad.

COMMISSIONER. Why, Governor Stevens was here to survey this country for a line of railroad. There is no attempt to take the country from you. You know that we are not proposing to take the country from you at all, and yet you speak as if we were.

ARLEE. Governor Stevens said in twenty years another treaty would end this.

COMMISSIONER. Arlee is mistaken. Of course this treaty is in force. Governor Stevens may have said that he or others would come back in twenty years, but not that the treaty would expire in that time. Do you want me to return to the Great Father and tell him that the good Indians, whom he always thought his friends, refused to sell a little land for ten dollars per acre, when not even the bad Indians of the country have asked that for their lands?

MICHELLE. How would it be if you had a good horse and I offered you a price that you did not think was right; if I took the horse wouldn't you complain?

When we made the treaty we did not say railroads could pass through our country; only common roads.

COMMISSIONER. They said roads of every description. Suppose I were to give Michelle a loaf of bread every day, and then were to ask him to return me a very small slice, would he not be a very bad Indian if he did not give me the slice when I needed it, especially if I had paid him the money for it? So the Great Father says, "You can have this country, but I want a small slice or strip for a road," and afterwards offers to pay for it.

MICHELLE. If you wanted a small piece of bread, I would say, "Here is a piece." If you say it is too small, I would say, "Take what you want."

COMMISSIONER. Michelle does not understand; he never saw a million dollars; he don't know what it is. It is nearly seventy times $15,000. The Great Father could not afford to pay $10 an acre for the Indian lands in the United States. He could not afford to pay the price now offered you, and would not have offered this if these Indians had not always been friends and good. We are not trying to make a hard bargain; we want to be liberal to the Indians. That is all. Do you want me to go home and tell the Great Father, or do you want me to stay till to-morrow?

MICHELLE. Do as you wish.

COMMISSIONER. What do you wish?

MICHELLE. I do not understand. You know it is not done; the agreement is not made.

COMMISSIONER. Then I will stay. Ask them to meet me earlier to-morrow.

SEPTEMBER 2—1.30 P. M.

Commissioner MCCAMMON. My friends, I am glad to see you; I hope you did not think I had unkind

thoughts yesterday. I had none but kind thoughts in my mind. I desire to hear from you or to answer any questions you wish to ask. I talked long yesterday, but I wanted to make everything as plain as possible. I did not want any one to misunderstand what I said. I am sincerely your friend. I have had much to do with Indians, and I believe they all consider me their friend. *The Great Father wishes to make a present to good Indians, and although the Indians had agreed in the treaties of 1855 to let roads be built through this reservation without pay he thought none the less they should be paid.* The Great Father had the right to build the road without pay, but he thinks you should be paid; he thought you ought to receive some money from him as a present. I would like to hear from any of the chiefs what is your minds this morning.

ARLEE. I don't wish to change our calculations. When we heard that you were coming we made up our minds what to say to you. Yes, we are all good Indians, and we have a nice country, and I don't wish the Great Father should bother us by a big railroad through the reservation. When we heard of your coming we made up our minds what to say to you, and I said it to you yesterday. You seem to like your money, and we like our country; it is like our parents. I have the same feeling I had yesterday, and I am not the only one. I told you about the money—what we ask; and you said it was an exorbitant price. We do not wish to change our ideas; we told you yesterday about our wishes.

COMMISSIONER. In the treaty of 1855, made by Governor Stevens, the Indian tribes now represented here sold to the Great Father the country which was then claimed by them. That country was great; it

extended from the British line to Big Hole River, and was very broad east and west. The Indians were then satisfied with the treaty, and have never been dissatisfied since. The money paid to your tribes was the sum of $120,000. That was only about one-ninth of what you now claim for a little strip of country through your reservation. You ask about nine times more for this little strip than what you received for all that vast amount of land. So you see you are mistaken as to the value of this little strip of country. I want you to think of this; that the $15,000 I offered yesterday is very much more per acre than the money you received under the treaty of 1855. As I have been fair and reasonable, I have a right to ask that you should be, and that you should trust me. I am afraid some bad white men have been misleading you about the price. No man is your friend who tells you that you should receive $1,000,000 from the Government.

ARLEE. We are not any way dissatisfied or hostile toward you or the Government. We only want a fair bargain; fair play on both sides. My forefathers, our chiefs, the head chiefs of the tribe, were like men with veils over their heads; they could not see at all; they were like blind men; and when Governor Stevens arrived and he began talking about this part of the country, they had no idea of their country; they were stupid. They signed the treaty. This reservation was offered by the man who made the treaty, and we are holding on to it. Our forefathers are all dead, and we are the chiefs nowadays, and are hanging on it.

COMMISSIONER. You are quite right in holding on to your reservation. As your friend, I say hold on to it; it is your land. I would be willing to give you

the land you want up north; but the little line that the railroad wants won't interfere with your land; it will give the Great Father a better chance to protect you. There are many white men in the East who look after your interest more than you do yourselves; they would not allow a wrong to be done to you; they would, I know, approve of what I have told you. If I have not told you what the little strip is worth, I would not dare to go back among those people. You can ask any of your friends here and they will tell you that those white people know more about your wants than you do yourselves. Their hearts are always good toward you. These friends will watch me, and if I have not a good heart toward you they would blame me; but I know you think I have a good heart for you.

ARLEE. Now, won't you try to raise it a little more?

COMMISSIONER. I will consider for a moment. [After a pause.] I will tell the Great Father I gave you $16,000. I will tell him that you are good Indians, as he knows, and I thought you were entitled to $16,000.

ADOLPHE. How many years will this $16,000 last? [They consult.]

ARLEE. We want the money. The reason we did not get the money before was because we took it in annuities. We prefer the cash.

COMMISSIONER. The Great Father knows more about you than they did years ago; and whatever wrong was done you then, will not be repeated now. This very railroad will bring the Great Father nearer to you. The money will be expended for the benefit of the Indians in the manner the Great Father thinks best. If he thinks, after hearing from you, that it is better to let you have the money, he will pay the

money. You must depend upon his judgment as to how the money will be paid. The Great Father will never forget you. He gives you money from year to year; he has many whites and many Indians to look after, and he gives you what he can. Something has been said about your timber; no timber will be cut from your lands, except on the right of way through. Your forests will remain, except as they cut trees out in building a road. They may have to cut so that the trees won't fall on the road; that is all the trees that will be cut.

ARLEE. Yes, that is so. The timber is my property and we demand some money for my property. There is timber cut on the reservation. I am sure you don't know; it is off the road entirely; it is on the creek near Pig Pen. I went up there and saw it.

COMMISSIONER. The white men had no right to cut it, and they will be very careful not to repeat it.

ARLEE. Yes, this council don't amount to much, because cunning white men cut it on the sly.

COMMISSIONER. But the railroad can not afford to allow white men to cut timber on your land.

ARLEE. I am sure I saw it with my own eyes.

COMMISSIONER. It may have been a mistake. The railroad people have been very careful in not coming on the reservation.

ARLEE. It is tie timber.

COMMISSIONER. Arlee should remember that there may have been a mistake as to the line, and if within the reservation line they did not cut the timber intentionally. We will have that line surveyed, and see if timber has been cut inside of the reservation.

ARLEE. It came to my mind and I wanted it explained.

COMMISSIONER. I introduced the matter of timber to you because I do not wish any misunderstanding about it.

ARLEE. Yes, that is right.

COMMISSIONER. Arlee and the rest are wise to protect their people.

ARLEE. I am glad for one thing to-day. I am happy about that strip of country north. Do you think we will get it back?

COMMISSIONER. I hope so.

ARLEE. I am your friend. I hold your hand a long time.

MICHELEE. Now, my friend, I am glad about this strip of country north. We want that strip of country. I don't wish to be bothered by men on the other side. I want a road clear to the line where the other Kootenais are. If we get it we want to get the few settlers away who are there. We have lost many cattle in the reservation by men going up and down and driving them away; and these Indians are glad when you said you would increase the land. The railroad line goes right through my land; I am not uneasy about it; I am glad I am going to get money for it.

COMMISSIONER. I will report to the Great Father what you say about the strip of country north.

MICHELEE. It won't take long, and you have got a telegraph.

COMMISSIONER. The Great Father is not now in Washington, and it will take longer than you think. I shall have to go back and explain to him by word of mouth, the same as I do to you here.

MICHELLE. I had five head of horses on the road lately, and the whites stole them. I am afoot now. I am very happy to-day. At first you said you

would increase our land, but now you say you will report to the Great Father. I don't quite understand.

COMMISSIONER. I said I was willing, but it is the Great Father's land, and if he thinks best he will give it to you. As to the strip north, the Great Father did not know what was in your minds, but when he does he will do what is best for you.

MICHELLE. The way we understood it in 1855 was that the land north belonged to us, but the man who ran the line got lazy and did not go north far enough.

COMMISSIONER. *I now ask interpreter to read the agreement to the Indians.*

MICHELLE. *I don't consider this a bona fide bargain; it is borrowing this strip of land.*

COMMISSIONER. *It is the use of it.*

MICHELLE. *I don't want you, after you get away, to let the white people suppose you have bought the reservation, and let the white people squat on it. That is the way I think. It is like the railroad borrowing the strip of land.*

COMMISSIONER. *It is just buying the use of the strip of land.*

MICHELLE. *When I buy a horse I pay for it. You told us the country was ours. I considered the matter, and let you have it for public travel on the road. You have told me there won't be any white men on the reservation; that is the way I consider the matter.*

COMMISSIONER. *Michelle is quite right; he understands it. The railroad will only use the little strip, just like the wagon road. Michelle and the rest understand it perfectly. I suppose this by their approving what Michelle says.*

MICHELLE. *If you fulfill your promise I will be enjoying the reservation. Now, I understand you to say*

that when we go visiting we can jump on the railroad wagons and ride without paying expenses. I don't wish to pay a cent when I visit your country. Tell that to the Great Father.

COMMISSIONER. *Michelle is right; the Indians always ride without paying whenever they want to visit their friends or the white people; but the white people will not be allowed to go on the reservation. I will come every year or two, as often as I can, to see him, so he will see that my promises have been kept.*

MICHELLE. I wish that you would come once in a while, so that I can complain of not being treated right by the white men. You say you are our friend and will come. I will be glad to see you. I want you to know my heart. *I despise liquor, cards, a liar, and a thief. I don't want to see such people here.* Tell that to the Great Father. A lot of Indians of this tribe are below; if they want to come here they can do so; and if other tribes want to stop here we will let them stop if they behave.

COMMISSIONER. *I promise for the Great Father and myself to help put gamblers and liquor sellers off the reservation, and all other bad men; and also to let such Indians as you want come on here and live. You must let the Great Father know when you want these Indians to come here.*

MICHELLE. And I trust that the commanding officer over at the camp at Cold Springs will fix the bad white men and Indians. I am taken care of by white men, and my own Indian agent tells me Major Jordan will get after the bad whites and Indians. Of course if any of my Indians should spill blood, you can do with them as you please; I have nothing to say about it. Also I have nothing to say if you put in jail my drunken Indians. You need not ask my permission.

Do the best you can to keep peace and the white men from our country. *Try and keep the white men from selling whisky to my Indians. We are uneasy about whisky matters for fear of getting into hostilities and losing our lands. I am glad to hear that the man on Camas Prairie is arrested, and I hope you will punish him severely. You saw how it was the day you came here.*

COMMISSIONER. *Major Jordan, your agent, and the United States marshal will see that men who sell liquor to Indians are punished. They hate whisky; that is, they hate to have it sold to Indians, and they will do all in their power to prevent your young men from getting into trouble. You see what your agent did the other day in having that man on Camas Prairie put in prison. It is bad for Indians to drink whisky, but worse to sell it to them.*

MICHELLE. *My agent told me when that big gang of men came here from below, "I will be the man to watch and keep them from selling whisky to the Indians." I wish white men to come no nearer than Horse Prairie with liquor. My agent says we will be bothered while the road is being built, and I understand what he tells me. I wish you would do the best you can to keep bad men from doing damage. I suppose we will be bothered while the new road is being built, and I want Major Jordan to be ready any day to take my part. I will let the agent know first, and he will say to Major Jordan—and this big chief is listening.*

COMMISSIONER. *Michelle understands it perfectly, and the rest.*

ARLEE. *I don't want white men to bring stock here any more. There will be lots of people here when the railroad is finished. The officers can clear off white men.*

COMMISSIONER. *While the road is being built some stock will be used by the white men. When an agent wants the commanding officer at Fort Missoula, he sends for him. I want you to understand that while the road is being built much stock will be here. If your agent wants troops he will send for them to protect you.*

AFTERNOON SESSION, 3 P. M.

COMMISSIONER. My friends, I am about through with our talk. From my heart I say you have done well. When you see me another year I hope you will say you have done well. You will not regret one thing that has been done. You have done the best that could be done for yourselves and for the white man. I will go down the river and put a value on the individual improvements on the ranches used by the railroads. I want you to ask Arlee, Adolphe, Eneas, Big Sam, Pattie, and all the rest, to come and sign this paper to-day, or go to the agency, so that all of their names will be on this paper. Then this will be the last time I will see my good friends of these tribes. To-morrow I will leave, and will go and see the Great Father and will tell him all your wishes, particularly about your wanting that strip of land to the north. The Great Father wants to do the best for all his people, and he will listen to me and do what he thinks best about that and all other things. I am through.

MICHELLE. You told us you were going to have a fair understanding. You told us that you would be glad to have the amount of the land increased. I was glad when you mentioned that; I jumped up from my chair and shook hands with you, and then you said it was not in your power, but you would mention it to the Great Father. It was that that

made me let go of the million dollars. I don't quite understand why you say now you have no authority to treat for that strip, but will mention it to the Great Father. I would like to have a copy of the treaty and have men who can read explain it to me.

COMMISSIONER. Michelle is right; the land is not to be sold to the railroad company. He shall have a copy of the agreement. Michelle is mistaken if he thought I told him I had authority to treat now for the strip of land at the head of the lake. I said all along, yesterday and to-day, that I could only report to the Great Father what they wished, and he will likely send some one out here to see them about this land. I don't want to have Michelle make a mistake.

ARLEE. I don't consider we are mistaken; that is the reason we jumped and shook hands.

COMMISSIONER. I explained it to Arlee, as I had done before. You must trust the Great Father, and trust that I will tell him. Now, I would like to go with the agent and see the farms. I would like to have you ask the agent whether I said I would treat about that north land to-day. I didn't understand Michelle's remark to be that he would sign this agreement on account of that strip of land. I said I would give you $16,000. I said we would stop talking about the north land.

ARLEE. You were talking about that to Michelle. That money is a small sum. Donald says so. So far as I am concerned, I agree with you. You said that personally you would be glad to have them have the land.

COMMISSIONER. I told them from the first I had no authority to treat regarding that north land. I illus-

trated it to him yesterday when I spoke about his sending a man for fish.

MICHELLE. If we could get the strip of country north, we would not ask anything for the right of way.

COMMISSIONER. I repeat what I before said, that I have no right to give the strip of land north; but I said I would tell the Great Father. Suppose Michelle, Arlee, and Eneas wanted to sell the reservation, and came to me for that purpose, you would say, "They have not consulted our people and have no right to sell our reservation." Unless they consult their people they could not bind them. That is what I said. I could not bind the Great Father until I told him about it. Your chiefs can do nothing without consulting their people. I can do nothing except by the orders of the Great Father. He has given me no orders about this strip.

ARLEE. I knew you would not give that million of dollars. My people don't want the railroad through here, and that's why I asked a million dollars.

COMMISSIONER. All I said is written down, and you can have a copy of what I said. I have told you the Great Father said the road was to be built, not for the benefit of the white men only, but also for the Indian.

ARLEE. I don't know how the road would benefit the Indians.

COMMISSIONER. That is because Arlee never saw a railroad. The Indians will be nearer the Great Father, and he will be better able to protect you. I told you also that if you followed the Great Father's wishes in this matter, he would do what was best for you and might give it to you.

ARLEE. Yes; the only benefit I see is if you give us that strip of land north, when I die it will benefit

my children. The papers you have do not say that we have sold the country.

MICHELLE. A great many have clear ideas; others are stupid, and can not understand it; so we want a copy.

COMMISSIONER. The white men think I have been very kind to the Indians, and have tried to explain everything as plainly as possible. The agent and commanding officer will say so. Agent Ronan and I will have to leave now. I want the men to sign the agreement.

MICHELLE. I am not bothering my head about the railroad going through my field. I know that is right. If we can get back that country north we don't care about the railroad going through; it may go through free. Don't have hard feelings toward us for saying this. We are all one. My skin is dark. We are one nation. The international line is far north, but we are under one flag. You treat me as one of your people, and I want to do the same. The agent told me himself that he had instructions to see that the Indians get their rights.

COMMISSIONER. I will promise to use my influence to get that strip of land for you, and I want you in return to get signatures for this agreement. I feel kind to all the chiefs and to the rest of you. We all belong to one nation. We were all born in the United States.

MICHELLE. This reservation is only large enough for three depots.

COMMISSIONER. The depots will be as small as possible. You will see what the railroad does. If you find reason to complain, your objections must be made to the Great Father. Everything possible will be done to make the Indians contented and

happy. There will be only five stations, and if the Indians are good and sober, the railroad will probably employ them.

MICHELLE. That is all I have to say.

ADOLPHE. I am one of the Flatheads. I am going to speak to you. This and Bitter Root is my country. You told us once we should respect the Great Father, and I think you should respect what I have said; for this reason I have great faith in the Great Father and you, and therefore talk of this strip of land. I guess we will be happy on this reservation. Look at the blood the white man has spilled. Where is the blood we have spilled? Just for this I respect and honor the Great Father and you, for I know he is a good-hearted man. Our God is a good, kind God. Our chiefs have been directed from above to treat your people well.

The council then adjourned.

APPENDIX B.

THE DEED.

Whereas by section one of an act of Congress approved July second, eighteen hundred and sixty-four, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route" (thirteenth Statutes at Large, page three hundred and sixty-five), the Northern Pacific Railroad Company was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound; and

Whereas by section two of said act, Congress granted to said company the right of way for the construction of said railroad and telegraph line to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations; and

Whereas by said section two Congress provided that the United States should extinguish as rapidly

as may be consistent with public policy and the welfare of the Indians, the Indian titles to all lands falling under the operation of this act and acquired in the donation to the road named in the act; and

Whereas by treaty between the United States and the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, concluded at Hell Gate, in the Bitter Root Valley, July sixteenth, eighteen hundred and fifty-five, and duly ratified and proclaimed (twelfth Statutes at Large, page nine hundred and seventy-five), a district of country therein described, situate in the then Territory of Washington, but now included within the boundaries of the Territory of Montana, was set apart for the use and occupation of said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington, who may agree to be consolidated with the tribes parties to said treaty, under the common designation of the Flathead Nation; and

Whereas by article three of said treaty it is provided that "if necessary for the public convenience roads may be run through the said reservation, and on the other hand the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways;" and

Whereas by treaty between the United States and said Flathead Nation of Indians and others, concluded at the council ground on the Upper Missouri, near the mouth of the Judith River, in the Territory of Nebraska, October seventeenth, eighteen hundred and fifty-five, duly ratified and confirmed (eleventh

Statutes at Large, page six hundred and fifty-seven), it is provided (in the eighth article thereof) that "for the purpose of establishing traveling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description, establish lines of telegraph, and military posts; use material of every description found in the Indian country, build houses for agencies, missions, schools, farms, shops, mills, stations, and for any other purpose for which they may be required, and permanently occupy as much land as may be necessary for the various purposes above enumerated, including the use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States"; and

Whereas the said company did on the fifth day of July, eighteen hundred and eighty-two, file in the Department of the Interior a map showing the definite location of its line of railroad from the southern boundary of the reserve for the Flathead Indians, thence northwesterly across the southwestern part of said reserve to the western boundary thereof, all lying and being within the Territory of Montana, as definitely fixed and determined in compliance with said act of Congress, and as approved by the board of directors of said company by resolution passed May ninth, eighteen hundred and eighty-two; and

Whereas the said company desires to construct its line of railroad upon such designated route and claims the right by virtue of said act so to do:

Now, therefore, in order to fulfill the obligations of the Government in the premises,

This agreement, made this 2nd day of September, in the year of our Lord eighteen hundred and eighty-two, between the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreille Indians, resident on the Jocko (or Flathead) Reservation, in the Territory of Montana, represented by their chiefs, headmen, and heads of a majority of families, and being a majority of all the adult male Indians occupying or interested in the lands hereinafter described, the said Indians acting under the supervision and with the approval of the Secretary of the Interior of the United States, of the one part, and the United States of America, represented by Joseph Kay McCammon, Assistant Attorney General of the United States, duly appointed in this behalf by the Secretary of the Interior, of the other part, witnesseth:

That for the consideration hereinafter mentioned the said confederated tribes of Flathead, Kootenay, and Upper Pend d'Oreille Indians do hereby surrender and relinquish to the United States all the right, title, and interest which they now have under and by virtue of the aforesaid treaty of July sixteenth, eighteen hundred and fifty-five, in and to all that part of the Jocko (or Flathead) Reservation, situate in the Territory of Montana and described as follows, namely:

A strip of land not exceeding two hundred feet in width, that is to say, one hundred feet on each side of the line laid down on the map of definite location hereinbefore mentioned wherever said line runs through said reservation, entering the same at or near the summit of Coriagan Defile, passing by the valley

of Finlay Creek to the Jocko, along the Jocko to the Pend d'Oreille River, and down the valley of the Pend d'Oreille, passing out of the reservation at or near the mouth of the Missoula River, said strip of land being intended to be used by the said Northern Pacific Railroad Company, its successors or assigns, as a right of way and roadbed, and containing 2,300 acres. An official copy of said map of definite location was, on the day of the date hereof, produced and shown to said Indians in council assembled, was fully explained to them, and is herewith attached, marked with the letter A, and made a part of this agreement.

Also the several pieces or parcels of land situate along and adjoining the said strip of land hereinbefore described as the same are delineated on the five several plats or maps thereof also now produced and shown to said Indians and hereto attached and marked, respectively, with the letters B, C, D, E, F, and containing, respectively, the following areas, that is to say: Tract B, seventy acres; tract C, fifteen acres; tract D, fifteen acres; tract E, fifteen acres; tract F, fifteen acres; aggregating (exclusive of the strip of land hereinbefore mentioned) one hundred and thirty acres, the same being intended to be used by the said Northern Pacific Railroad Company for the purposes of station houses, depots, sidings, &c.

In consideration of such surrender and relinquishment of lands as aforesaid, amounting in the aggregate to fourteen hundred and thirty acres, the United States stipulates and agrees to pay to the said confederated tribes of Flathead, Kootenay, and Upper Pend d'Oreille Indians the sum of sixteen thousand ($16,000) dollars, being at the rate of eleven $\frac{18}{100}$ dollars per acre, to be deposited in the Treasury of the

United States to the credit of the said confederated tribes upon ratification of this agreement by Congress, and necessary appropriations made therefor, the sum aforesaid to be expended for the benefit of said Indians in such manner as the Secretary of the Interior may direct.

And for the considerations aforesaid, the United States further stipulates and agrees, upon ratification of this agreement by Congress and necessary appropriation therefor, to pay to the individual Indians, members of said confederated tribes, whose names appear on the schedule hereto annexed, marked with the letter K, the several sums set opposite their respective names and amounting in the aggregate to the sum of seven thousand six hundred and twenty-five dollars, as full compensation for any damages to improvements, or fenced or cultivated fields, which they may sustain by reason of the surrender and relinquishment of said lands or any part thereof as aforesaid, such compensation to be expended for the benefit of such individual Indians, or paid to them in cash, in the proportions to which they may be severally entitled thereto, appearing by said schedule, as the Secretary of the Interior may direct.

All provisions of existing treaties with the confederated tribes of Flathead, Kootenay, and Upper Pend d'Oreille Indians not affected by this agreement, to remain in full force and effect, and this agreement to be subject to ratification by Congress.

Executed at the Flathead Agency, in the Territory of Montana, this 2nd day of September, anno Domini eighteen hundred and eighty-two.

JOSEPH KAY MCCAMMON,
Assistant Attorney General.

The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen, and heads of a majority of families, being a majority of all the adult male Indians of the confederated tribes of Flathead, Kootenay, and Upper Pend d'Oreille Indians, respectively, occupying or interested in the lands of the Jocko (or Flathead) Reservation, in the Territory of Montana, do hereby consent and agree to all the provisions and stipulations therein contained.

Witness our hands at the Flathead Agency, Mont., the day and year last aforesaid.

MICHELLE, his x mark.
ARLEE, his x mark.
ENEAS, his x mark.
PATTEE (SHTAS), his x mark.
BIG SAM, his x mark.
DANDY JIM, his x mark.
RED MOUNTAIN STCHAW, his x mark.
JIM FINLAY, his x mark.
ALEXANDER MATTE, his x mark.
MICHELLE RIVAIS, his x mark.
(And 209 other signatures.)

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CLAIRMONT v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 239. Submitted May 1, 1912.—Decided June 10, 1912.

The act of January 30, 1897, 29 Stat. 506, c. 109, in regard to sale of liquor to the Indians and introduction of liquor into Indian country, repealed, as far as inconsistent therewith, the Act of July 23, 1892, 27 Stat. 260, c. 234.

An indictment under the act of January 30, 1897 for introducing liquor into Indian country cannot be sustained if the offense alleged was committed on land within a State and which had been completely withdrawn from the reservation, and the Indian title thereto surrendered so as not then to be Indian country. Under such circumstances the District Court of the United States has no jurisdiction.

Although that portion of the act of 1834 which defined Indian country was repealed by § 5596 Rev. Stat., it may still be referred to in connection with the portion of the act remaining in force in order to determine what must be regarded as Indian country when spoken of in the statutes.

A cession by Indians may be qualified by a stipulation in the treaty that the ceded territory, although within the boundaries of a State, shall retain its original status of Indian country so far as the introduction therein of liquor is concerned.

The title to that part of the Flathead Reservation in Montana included within the right of way of the Northern Pacific Railway Company, has been completely withdrawn from the Reservation and the Indian title thereto extinguished and therefore is no longer Indian country within the meaning of the act of January 30, 1897.

THE facts, which involve the construction of Federal statutes relative to introduction of liquor to allottee Indians and on allotments to Indians, are stated in the opinion.

Mr. N. W. McConnell and *Mr. O. W. McConnell* for plaintiff in error.

Mr. Assistant Attorney General Denison, with whom *Mr. Louis G. Bissell*, Attorney, was on the brief, for the United States:

Beyond question the Indian land title in this strip had been entirely extinguished. 13 Stat. 365; *Northern Pacific R. R. Co.* v. *Townsend*, 190 U. S. 267; *Buttz* v. *Northern Pacific Railroad Co.*, 119 U. S. 355.

There is nowhere any express provision for the retention of any Federal police power over this strip, excepting that statements were made by the representative of the United States in the council with the Indians which preceded their deed to the effect that no liquor would be sold "on the reservation at the depots;" that after the road was built there would be "no white men to sell liquor," and that "the white people will not be allowed to go on the reservation."

This informal and parol agreement, and the fact that the grant was made for the limited purpose, and the physical situation of the strip in reference to the reservation and in its contact with the Indians brings this case under *Dick* v. *United States*, 208 U. S. 340.

In the Montana enabling act, 25 Stat. 677, the United States reserved its jurisdiction with reference to "unappropriated public lands."

In view of these conditions, the decisions of this court in *Maricopa Railroad Co.* v. *Arizona*, 156 U. S. 347, and *Bates* v. *Clark*, 95 U. S. 204, 208, 209, may perhaps finally dispose of the case; and see *Utah & Northern Ry.* v. *Fisher*, 116 U. S. 28, which seems to imply that the grant of a railroad right of way takes the land out of the reservation only in so far as may be necessary for the particular purposes of the grant.

The territorial power to tax the railroad line is not nec-

essarily inconsistent with the continuation of the Federal police power for purposes of the discharge of the duty toward the Indians. *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; 108 U. S. 491; *United States* v. *McBratney*, 104 U. S. 621; *Thomas* v. *Gay*, 169 U. S. 264, 277; *Draper* v. *United States*, 164 U. S. 240; *Truscott* v. *Hurlburt Land & Cattle Co.*, 73 Fed. Rep. 60.

The *locus in quo* was a part of a tract definitely set apart as a reservation for exclusive occupancy by the Indians, 12 Stat. 940. It, therefore, possessed its character as Indian country more because of the specific action by Congress than by reason of the original general definition of Indian country. 4 Stat. 729.

As to *United States* v. *4 Bottles Sour Mash Whiskey*, 90 Fed. Rep. 720, see 22 Ops. Atty. Genl. 232.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error was indicted by the grand jury of the United States for the District of Montana for introducing intoxicating liquor into the Flathead Indian Reservation. It appeared upon the trial in the District Court that he lived on the reservation and at the time of the alleged offense was returning to his home from Missoula on a train of the Northern Pacific Railway Company, intending to leave the train at Ravalli. A special officer of the Interior Department boarded the train at Arlee, and, finding a pint of whisky on the person of the plaintiff in error, at once arrested him and took him back to Missoula. Both Arlee and Ravalli are points within the exterior limits of the reservation, which is crossed by the right of way of the railway company.

The jury rendered a verdict of guilty, whereupon it was urged by motion in arrest of judgment that the court was without jurisdiction. The motion was denied and the defendant was sentenced to imprisonment for sixty

days and to the payment of a fine of $100. The case comes here on writ of error, the District Judge certifying the question of jurisdiction. The conviction was had under the act of January 30, 1897, c. 109,[1] 29 Stat. 506, which provides:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever . . . to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided however*, That the person convicted shall be committed until fine and costs are paid."

We are not here concerned with that portion of the statute which penalizes selling or giving intoxicating liquors to the Indians described or with the authority of Congress to protect the Indian wards of the Nation.

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[1] This repealed, so far as it was inconsistent, the act of July 23, 1892, c. 234, 27 Stat. 260, which amended § 2139 of the Revised Statutes.

The indictment charged that the plaintiff in error "did, then and there, wrongfully and unlawfully introduce" a quantity of intoxicating liquor "into the Flathead Indian Reservation, in the State and District of Montana," the said reservation "being an Indian country." The offense alleged was the introduction of the liquor into the reservation, and not "attempting to introduce."

The Flathead Indian Reservation was established by the treaty of July 16, 1855, between the United States and the confederated tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians. 12 Stat. 975. It comprised a district now included within the boundaries of the State of Montana. The Enabling Act of 1889, under which the State was formed, required the adoption of an ordinance, irrevocable in the absence of the consent of the United States, providing: "That the people inhabiting" the proposed State "do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Act of February 22, 1889, c. 180, 25 Stat. 676, 677.

By the act of July 2, 1864, c. 217, § 2, 13 Stat. 365, 367, Congress granted a right of way through the public lands to the Northern Pacific Railroad Company for the construction of a railroad and telegraph as proposed, "to the extent of two hundred feet in width on each side of said railroad," including all necessary ground for station buildings, workshops, etc. It was provided that the United States should "extinguish, as rapidly as may be consistent with public policy and the welfare of the said

Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill." On July 5, 1882, the railroad company filed a map of definite location showing its line of railroad across the southwestern part of the Flathead reservation. Thereupon on September 2, 1882, the confederated tribes above mentioned entered into an agreement with the United States by which, after reciting the grant by Congress of the right of way, the treaties with the Indians, and the filing of the map of definite location, the Indians surrendered and relinquished to the United States "all the right, title and interest which they now have under and by virtue of the aforesaid treaty of July sixteenth, eighteen hundred and fifty-five, in and to all that part of the Jocko (or Flathead) Reservation situate in the Territory of Montana and described as follows, namely: A strip of land not exceeding two hundred feet in width, that is to say, one hundred feet on each side of the line laid down on the map of definite location hereinbefore mentioned wherever said line runs through said reservation." In consideration of the "surrender and relinquishment of lands as aforesaid," amounting in the aggregate to 1430 acres, the United States agreed to pay to the Indians the sum of $16,000. (Ex. Doc. No. 15, 48th Cong. 1st sess.)

Thus, by the grant of Congress the railroad company obtained the fee in the land constituting the "right of way" (*Buttz* v. *Northern Pacific R. R. Co.*, 119 U. S. 55, 56, 66; *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, 271), and by virtue of the agreement between the United States and the Indians this land was freed from the Indian right of occupancy. As the Government states in its brief: "Beyond question the Indian land title in this strip had been entirely extinguished."

The question then is whether a person having intoxicating liquor in his possession on a railroad train running

on this strip can be deemed to have introduced the liquor "into the Indian country" within the meaning of the act of 1897. Was the strip "Indian country" so that the District Court of the United States can be said to have had jurisdiction of the alleged offense?

The act of June 30, 1834, c. 161, 4 Stat. 729, thus defined "the Indian country":

"That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

This portion of the act of 1834 was not reënacted in the Revised Statutes, though other parts of the statute were, and hence was repealed by § 5596 of the revision. But, as has frequently been stated by this court, the definition may still "be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." *Ex parte Crow Dog*, 109 U. S. 556, 561; *United States* v. *LeBris*, 121 U. S. 278, 280.

The proper criterion to be applied was considered in *Bates* v. *Clark*, 95 U. S. 204, where Mr. Justice Miller, delivering the opinion of the court, said (*id.*, pp. 207, 208): "Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence,

whose operation was confined to the Indian country, whatever that may be. . . .

"The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

It must be assumed that, in the act of 1897, Congress used the words "Indian country" in the accepted sense. And this is confirmed by the provision bearing witness to the policy which had been adopted looking to the dissolution of tribal relations and the distribution of tribal property in separate allotments. Thus, the act provides that the term Indian country "shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States." *United States* v. *Sutton*, 215 U. S. 291; *Hallowell* v. *United States*, 221 U. S. 317, 323, 324.

That the effect of a cession by the Indians might be qualified by a stipulation in the treaty that the ceded territory, although within the boundaries of a State, should retain its original status of Indian country so far as the introduction into it of intoxicating liquors was concerned was decided in *United States* v. *Forty-three Gallons of Whiskey, &c.*, 93 U. S. 188; 108 U. S. 491. But, as was pointed out in *Bates* v. *Clark*, *supra*, that decision proceeded upon the hypothesis that "when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule." The same principle of decision was recognized in *Dick* v.

United States, 208 U. S. 340. There, the plaintiff in error had been convicted of introducing intoxicating liquor into the Nez Perce Indian Reservation within the State of Idaho. The offense was committed, if at all, in the village of Culdesac, which, although within the boundaries of the reservation as established before Idaho was admitted into the Union, was at the time specified in the indictment an organized village of that State. The lands upon which the village was located were part of those ceded to the United States by an agreement with the Indians in which it was stipulated that the ceded lands, as well as those retained, should be subject for the period of twenty-five years to all Federal laws prohibiting the introduction of intoxicants into the Indian country. It was held that this was a valid stipulation based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with the Indians, and was "not inconsistent, in any substantial sense, with the constitutional principle that a new State comes into the Union upon entire equality with the original States" (p. 359). Upon this ground the judgment of conviction was affirmed.

While the *Dick Case* was thus found, owing to the stipulation in the agreement, to be within the exception, the court explicitly recognized the rule which governs in the absence of a different provision by treaty or by act of Congress. The court said (p. 352): "If this case depended *alone* upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction

of the State, for all purposes of government, was full and complete. *Bates* v. *Clark*, 95 U. S. 204; *Ex parte Crow Dog*, 109 U. S. 556, 561."

In the present case there was no provision, either in the treaty with the Indians, or by act of Congress, which limited the effect of the surrender of the Indian title. We have been referred to certain statements made by the representative of the United States in the course of the negotiations with the Indians which preceded their agreement, but these were of an informal character and cannot be regarded as qualifying the agreement that was actually made. The Indian title or right of occupation was extinguished, without reservation; and the relinquished strip came under the jurisdiction of the then Territory and later under that of the State of Montana. It was not "unappropriated public land," or land "owned or held by any Indian or Indian tribe." (Enabling Act, *supra.*)

To repeat, the plaintiff in error was not charged with "attempting to introduce" the liquor into Indian country, but with the actual introduction. If having the liquor in his possession on the train on this right of way did not constitute such introduction, it is immaterial so far as the charge is concerned whether or not he intended to take it elsewhere. Nor is it important that the plaintiff in error was an Indian. The statute makes it an offense for "any person" to introduce liquor into Indian country.

Our conclusion must be that the right of way had been completely withdrawn from the reservation by the surrender of the Indian title and that in accordance with the repeated rulings of this court it was not Indian country. The District Court therefore had no jurisdiction of the offense charged and the judgment must be reversed.

The judgment is reversed and the cause remanded with directions to quash the indictment and discharge the defendant.